Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

WARDEN OF CALIFORNIA MEN'S COLONY, *Petitioner,*

v.

GREGORY DEAN CALIENDO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code prohibits a federal court from granting a state prisoner habeas corpus relief as to a claim adjudicated by a state court unless the state court's decision was contrary to, or an unreasonable application of, "clearly established" Supreme Court precedent. In *United States v. Olano*, 507 U.S. 725, 739 (1993), this Court observed that the "ultimate inquiry" in jury intrusion cases is whether the intrusion affected the jury's deliberations. Here, the Ninth Circuit held that the state court's finding that no prejudice had resulted from a jury intrusion was contrary to Supreme Court precedent because the state court did not apply a *presumption* of prejudice, even though it conducted a full hearing before making the finding.

The Question Presented is:

Whether this Court's precedents "clearly establish" that the Constitution requires application of a presumption of prejudice in cases of jury intrusion.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

WARDEN OF CALIFORNIA MEN'S COLONY, *Petitioner,*

v.

GREGORY DEAN CALIENDO, *Respondent.*

Petitioner John Marshall, Warden of the California Men's Colony, at San Luis Obispo, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The Ninth Circuit's opinion is reported as *Caliendo v. Warden of California Men's Colony*, 365 F.3d 691 (9th Cir. 2004). The order of the United States District Court for the Central District of California is unreported. Both are reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit reversing the judgment of the District Court with instructions that Caliendo be released or granted a new trial within seventy days of the issuance of the court's mandate was filed on April 5, 2004. App. C. The Ninth Circuit denied the Warden's petition for rehearing with

suggestion for rehearing en banc on June 12, 2004. App. B. This Court's jurisdiction lies under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. State Court Proceedings

Just past midnight on the morning of July 22, 1995, Los Angeles County Sheriff's deputies discovered respondent Caliendo inside a car that appeared to have been broken into. One of the windows of the car was shattered, and Caliendo was underneath the dashboard holding a screwdriver. The owner of the car later confirmed that several belongings he had left in the car were missing. Those items were not found on Caliendo or in the vicinity of the car. In an interview with Los Angeles County Sheriff's Detective John Mundell, Caliendo admitted he had broken into the car but claimed he did so only because he

needed somewhere to sleep after his wife had kicked him out of their apartment.

Caliendo was tried for second degree burglary of a vehicle. Among other evidence presented by the prosecution, Detective Mundell testified that Caliendo admitted breaking into the car. Relying on the state of the evidence and the testimony of his wife, Caliendo's defense was that the car had already been broken into when he decided to use it as a place to sleep. The jury deadlocked, and a mistrial was declared.

On retrial, Detective Mundell was seen having a conversation with several jurors for approximately fifteen minutes outside the courtroom during a break in the proceedings. Upon being informed of the contact, the court immediately held a hearing. The court first questioned Detective Mundell outside the presence of the jury. Detective Mundell admitted that he had talked to two or three jurors but explained that they had not discussed any matters pertaining to the case. He told the court that the conversation had consisted only of "small talk" about such topics as baseball, small towns, and his workload. App. K at 6-10.

The court then questioned the jury about the contact. Three jurors stated that they had talked to Detective Mundell outside the courtroom. The jurors confirmed that they had not discussed anything concerning the case. One of the jurors told the court that he and Detective Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer." The second juror had talked to Detective Mundell about his workload and his exercise regimen. The third juror had only asked Detective Mundell what time he thought the proceedings would resume. Other jurors, as well as an independent witness, stated that they had not overheard any conversation about the case between the three jurors and Detective Mundell. The court asked each juror individually

whether the incident would affect his or her judgment, and each juror affirmed that it would not. App. K at 11-20.

The court denied Caliendo's mistrial motion, finding that the contact with Detective Mundell would not affect the jury's judgment. The jury ultimately found Caliendo guilty. Subsequently, the court denied Caliendo's new trial motion, app. K at 25-42, and sentenced him under California's Three Strikes Law to a term of twenty-five years to life in state prison.

Caliendo appealed from the judgment of conviction, arguing, inter alia, that the jury intrusion raised a presumption of prejudice that the prosecution should have been obligated to rebut, and that the prosecution, on this record, could not rebut. The California Court of Appeal affirmed Caliendo's conviction, holding that, while Detective Mundell's conversation with the jurors was "improper and fraught with the danger of improper influence and communication of extraneous information," no presumption of prejudice was applicable. The court of appeal also concluded that "the record as a whole discloses no reasonable probability of actual harm" to Caliendo because the conversation between Detective Mundell and the jurors did not have any tendency to influence the jurors and all of the jurors averred that their judgment would not be affected by the conversation. App. J.

The California Supreme Court denied Caliendo's petition for review. App. I.

B. District Court Habeas Corpus Proceedings

Caliendo filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, pursuant to 28 U.S.C. § 2254, again raising his claim that the jury intrusion should have given rise to a rebuttable presumption of prejudice. Applying the strict standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the District Court agreed with the California Court of Appeal that the conversation between

Detective Mundell and the jurors, although improper, did not give rise to a presumption of prejudice. Specifically, citing this Court's opinion in *United States v. Olano*, 507 U.S. 725, 738-39 (1993), the District Court found that this Court's precedent could reasonably be interpreted as requiring Caliendo to prove prejudice because the intrusion had been "minimal." The District Court also found that there was no showing of actual prejudice in this case. Again citing *Olano*, the District Court observed that the "ultimate inquiry" in jury intrusion cases is simply, "Did the intrusion affect the jury's deliberations and therefore its verdict?" Based on the evidence adduced at the state court's hearing concerning Detective Mundell's conversation with the jurors, the District Court found that the state court's determination that no prejudice had resulted from the jury intrusion was not unreasonable under the AEDPA. The District Court therefore denied Caliendo's petition. App. F-H.

C. Ninth Circuit Proceedings

Caliendo appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's judgment. In a published opinion, the Ninth Circuit panel identified a three-tiered analytical framework it held to be applicable as a constitutional matter in jury intrusion cases. First, relying on *Smith v. Philips*, 455 U.S. 209, 217 (1982), and *Gonzales v. Beto*, 405 U.S. 1052, 1058, 1055 (1972) (memorandum dissent and concurrence), the court found that where the intrusion is de minimis, the defendant must make an affirmative showing of prejudice. App. C at 9-10. Second, citing *Mattox v. United States*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227, 228 (1954), the court held that where the intrusion is not de minimis, i.e., where it "raises a risk of influencing the verdict," prejudice is presumed but may be rebutted by the prosecution. App. C at 7-9. Third, pointing to *Turner v. Louisiana*, 379 U.S. 466 (1965), the court concluded that where the intrusion is "continuous and intimate,"

a conclusive presumption is applied. App. C at 8 n.2. The panel determined that this case fell into the second category and that the California Court of Appeal's failure to identify and apply the "*Mattox* Rule" was "contrary to the governing law set forth by the Supreme Court in *Mattox*." App. C at 12.

The Ninth Circuit panel went on to hold that, because the state court's determination that no prejudice resulted from the jury intrusion had been reached through the application of an erroneous legal standard, the panel could not defer to the state court's conclusion. In its original published opinion, the panel, conducting a de novo review, found that "the government rebutted the *Mattox* presumption by making a strong contrary showing that the contact between Mundell and the three jurors was harmless." App. E at 12. However, the panel unanimously reversed course three months later and issued a superseding published opinion finding that "the government did not make a strong showing that the contact between Detective Mundell and the three jurors was harmless." App. C at 12. In the superseding opinion, the Ninth Circuit panel thus reversed the District Court's judgment with directions that Caliendo be released or retried within seventy days of the issuance of the court's mandate. App. C at 13.

The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc on May 12, 2004. App. B. The Warden filed a motion to stay the issuance of the mandate, which, on June 21, 2004, the Ninth Circuit granted. App. A.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit in this case discerned in this Court's precedents a "clearly established" federal constitutional rule mandating a rebuttable presumption of prejudice in certain jury intrusion cases and held that the state court's decision could not survive habeas corpus review under the AEDPA because the state court, despite holding a full hearing to assess the

prejudicial impact of the jury intrusion, failed to apply the rebuttable presumption. This decision flouted the AEDPA's strict standard of review. The Ninth Circuit disregarded this Court's latest jury intrusion decision, *United States v. Olano*, 507 U.S. 725 (1993), in which this Court itself signaled that its precedent on the issue was *not* clear and that the "ultimate inquiry" in such cases is simply whether the intrusion affected the jury's deliberations. Instead, the Ninth Circuit relied selectively on a body of precedent, including *Mattox v. United States*, 146 U.S. 140, 150 (1892), whose contours and constitutional underpinnings are unclear. The Ninth Circuit's characterization of the *Mattox* presumption as a "clearly established" federal constitutional rule is thus manifestly incorrect.

The importance of federal courts' adherence to the AEDPA's stringent standard of review has been repeatedly underscored by this Court. And the question of whether and how a presumption of prejudice should be applied in jury intrusion cases is a recurring one. Indeed, the federal appellate courts are divided as to whether *Mattox* is even a constitutionally-based decision and therefore applicable on habeas corpus. This Court should grant certiorari to address this important and recurring issue and to reverse the Ninth Circuit's unfounded, published holding that a constitutionally compelled rebuttable presumption of prejudice in jury intrusion cases is "clearly established" for purposes of AEDPA review.

A. The Ninth Circuit's Decision Violates The AEDPA Because It Rests On Precedent That Even This Court Itself Has Signaled Is Unclear

One of the cornerstones of the reform of federal habeas corpus review wrought by the AEDPA is the insistence that relief may be granted on a claim adjudicated by a state court only if the state court's legal decision was contrary to, or an unreasonable application of, "clearly established" Supreme

Court precedent. 28 U.S.C. § 2254(d). Only recently, this Court emphasized that "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 124 S. Ct. 7, 11 (2003); see also *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (precedent that is unclear or inconsistent may not serve as the basis for habeas corpus relief under the AEDPA.) The Ninth Circuit's three-tiered framework for analyzing jury intrusion cases, and in particular its assertion that a rebuttable presumption of prejudice applies to cases such as this one, does not rest on "clearly established" law as determined by this Court.

In *United States v. Olano*, this Court, after surveying several of its leading jury intrusion decisions, said:

> There may be cases where an intrusion should be presumed prejudicial, see, *e.g.*, *Patton* [*v. Yount*, 467 U.S. 1025, 1031-35 (1986)]; *Turner v. Louisiana*, 379 U.S. 466 . . . (1965), but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?

United States v. Olano, 507 U.S. at 739. The Court in using this language appears to have acknowledged the unsettled state of its jury intrusion jurisprudence. At the same time, the Court made clear that what matters in the final analysis is not whether a particular presumption is applied but only that a court actually make an inquiry into the extent of the possible prejudice arising from the intrusion. The state court here undertook precisely the "ultimate inquiry" described in *Olano*, holding a full hearing to determine whether the jury was actually prejudiced by Detective Mundell's intrusion. But in spite of *Olano*, the Ninth Circuit found the state court's adjudication contrary to clearly established Supreme Court precedent because the state court

made its determination without applying a presumption. This holding cannot follow from *Olano*.

Moreover, the jury intrusion framework that the Ninth Circuit considered to be clearly established ignores the very ambiguity in the jury intrusion decisions to which *Olano* spoke. See 5 LaFave, Israel, & King, Criminal Procedure § 24.9(f), p. 602 (2nd Ed. 1999) ("The method by which [the prejudice] assessment must take place, however, is not settled. Courts disagree, as a preliminary matter, when the defendant must prove, or the prosecutor must disprove, prejudice."). It is an open question, for example, whether a presumption applies where, as here, the intrusion was neither continuous and intimate nor involved communication directly related to the case. This Court has indicated that jury intrusion might rise to the level of a constitutional violation in only a handful of cases, and all of those cases involved either "continuous and intimate contact" or contact concerning the case itself. See *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (bailiff commented to jury on defendant's guilt); *Turner v. Louisiana*, 379 U.S. 466, 473-74 (1965) (two central peace officer witnesses for prosecution also acted as bailiffs during trial); see also *Gonzales v. Beto*, 405 U.S. 1052, 1053-56 (1972) (memorandum concurrence) (sheriff played "dual role" of bailiff and key prosecution witness); 5 LaFave, Israel, & King, *supra*, at 605. Even in *Remmer* – which, like *Mattox*, involved case-related contact – this Court said, "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial *about the matter pending before the jury* is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added). It is also questionable whether the *Mattox* decision even has any bearing in habeas corpus cases, since nothing in *Mattox* or *Remmer*, both of which were direct federal criminal appeals, suggests that the rule of presumed prejudice they set out has *constitutional* underpinnings.

It was undisputed in this case that Detective Mundell's contact with the three jurors was limited to the single brief occasion outside the courtroom during a recess and that their conversation did not in any way concern the case. The District Court thus held that a state court could reasonably read this Court's decisions as not requiring a presumption of prejudice under the present circumstances because the intrusion had involved "only one isolated incident of improper contact." And the District Court found the state court adjudication reasonable because there was "sufficient support in the record and the relevant case law for the state courts' finding that [Caliendo] was not prejudiced by the improper contact between Mundell and the jurors." App. H at 7, 10. Yet, the Ninth Circuit reversed the District Court because "the state court's analysis was framed erroneously," in that it failed to apply the *Mattox* presumption. App. C at 7. By disregarding the ambiguity in this area and dismissing the applicability of *Olano*, app. C at 10 n.3, the Ninth Circuit at once misapplied the AEDPA, perpetuated the uncertainty concerning the constitutional boundaries of jury intrusion law, and significantly undermined state courts' reasonable reliance on *Olano* as establishing the "ultimate inquiry" required in the context of jury intrusion.

B. The Question Presented Is Important And Recurring And Has Led To Division Among The Lower Courts

The question presented in this case is an important one, affecting the standard of review applicable in all federal habeas corpus cases brought by state prisoners. This Court has repeatedly stressed that federal habeas courts must afford state courts the deference owed to them under the AEDPA's stringent standard of review. See, *e.g.*, *Middleton v. McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam).

Nonetheless, here, that important deference has again been misapplied, this time in relation to the AEDPA's "clearly established" requirement. See *Mitchell v. Esparza*, 124 S. Ct. at 11; *Lockyer v. Andrade*, 538 U.S. at 71-72.

The issue, moreover, of how a presumption of prejudice should be construed in habeas corpus cases is recurring, as evidenced by the quantity of published decisions on the subject. See, *e.g.*, *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002); *Manning v. Huffman*, 269 F.3d 720 (6th Cir. 2001); *Agnew v. Leibach*, 250 F.3d 1123 (7th Cir. 2001); *Crease v. McKune*, 189 F.3d 1188 (10th Cir. 1999); *Lee v. Marshall*, 42 F.3d 1296, 1298-99 (9th Cir. 1995). And lower courts have been unable to reach a consensus even on the fundamental issue of whether *Mattox* and *Remmer* are applicable on habeas corpus. The Fourth Circuit, like the Ninth Circuit here, has followed *Remmer* in the habeas corpus context and found that certain jury intrusions raise a presumption of prejudice that may be rebutted by the prosecution. *Fullwood v. Lee*, 290 F.3d at 677-79. But the Tenth Circuit has held to the contrary: "We view the *Remmer* presumption as a rule of federal criminal procedure, rather than a rule of federal constitutional law. . . . Interests of comity and federalism, as well as 'the State's interest in the finality of convictions that have survived direct review within the state court system,' mandate a more deferential standard of review" on federal habeas corpus. *Crease v. McKune*, 189 F.3d at 1193 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

The jury intrusion precedent has provided no consistent path for the lower courts to follow in assessing prejudice. Cf. *Lockyer v. Andrade*, 538 U.S. at 72. The Ninth Circuit's decision that the *Mattox* rule is clearly established constitutional law that requires reversal of the state court's adjudication is therefore indefensible under the AEDPA. This Court should grant certiorari and reverse the Ninth Circuit's plainly unfounded pronouncement that, as a constitutional matter, a state court must apply a rebuttable presumption of prejudice in

jury intrusion cases in order to survive federal habeas corpus review under the AEDPA.

CONCLUSION

For all of the foregoing reasons, the Warden respectfully asks that the Court grant the petition for writ of certiorari.

Dated: August 6, 2004

Respectfully submitted,

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APPENDIX A

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY DEAN CALIENDO, Petitioner-Appellant, v. WARDEN OF CALIFORNIA MEN'S COLONY, Respondent-Appellee.	No. 01-56946 D.C. No. CV-99-7263-R ORDER

Before: HALL, O'SCANNLAIN, and McKEOWN, Circuit Judges.

Appellee's motion for a stay of mandate is GRANTED. The mandate is stayed until Friday, August 20, 2004, or until disposition by the Supreme Court of the United States if Appellee files a petition for writ of certiorari with the Supreme Court on or before that date.

APPENDIX B

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY DEAN CALIENDO, Petitioner-Appellant, v. WARDEN OF CALIFORNIA MEN'S COLONY, Respondent-Appellee.	No. 01-56946 D.C. No. CV-99-07263-R Central District of California, Los Angeles ORDER

Before: HALL, O'SCANNLAIN, and McKEOWN, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing. Judges O'Scannlain and McKeown have voted to deny the petition for rehearing en banc and Judge Hall has recommended denial. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY DEAN CALIENDO, *Petitioner-Appellant,* v. WARDEN OF CALIFORNIA MEN'S COLONY, *Respondent-Appellee.*	No. 01-56946 D.C. No. CV-99-07263-R OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
November 5, 2003---Pasadena, California

Filed January 9, 2004
Withdrawn March 29, 2004
Filed April 5, 2004

Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain,
and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Hall

COUNSEL

Kenneth M. Miller, San Clemente, California, for the appellant; Gregory Dean Caliendo, pro se, petitioner-appellant.

Michael R. Johnsen and David F. Glassman, Deputies Attorney General, Los Angeles, California, for the appellee.

OPINION

HALL, Circuit Judge:

Petitioner Gregory Caliendo appeals the district court's denial of his petition for writ of habeas corpus. He contends that the California Court of Appeal's decision upholding his conviction was contrary to Supreme Court precedent because the court did not presume prejudice from an incident of juror misconduct. A detective who provided testimony that was crucial to the prosecution's case had a twenty-minute conversation, factually unrelated to the trial, with three jurors in the hallway during a break in deliberations.

We exercise jurisdiction under 28 U.S.C. § 2253 and 28 U.S.C. § 1291. We hold that the state appellate court's decision was contrary to *Mattox v. United States*, 146 U.S. 140 (1892), in that the court did not apply a rebuttable presumption of prejudice. The state trial court did not presume prejudice either, so we review *de novo* the question whether the government clearly established that the extrinsic contact was harmless. We answer in the negative and, accordingly, grant the petition.

I. FACTS

After a Los Angeles County Superior Court jury convicted him of second-degree auto burglary in violation of California Penal Code section 459, Caliendo was sentenced to a state prison term of twenty-five years to life in accordance with California's three strikes law. His conviction resulted from a second trial; the jury in Caliendo's first trial hung 7-5 in favor of acquittal.

The central issue at both trials was whether Caliendo broke into a locked parked car–an essential element of auto burglary–or whether the car had previously been broken into when he entered it. Caliendo was arrested at 12:30 a.m. on July 22, 1995. Two sheriff's deputies noticed someone sitting in the passenger seat of a GMC suburban in a park and ride lot. Moments later, the deputies shined a spotlight on the car, approached it on foot, and illuminated the interior with their flashlights. They reported seeing Caliendo lying on his side with his head under the driver's side dashboard and a screwdriver in his right hand. A window on the passenger side was broken. The front and back doors on the passenger side were unlocked. When Caliendo stepped out of the vehicle, the deputies found the screwdriver and a large rock on the floor. The car had been parked there for two days. The owner was shown his car in the impound lot. He said that the rear right speaker had been unscrewed and that the car's sun visors and light bar were missing, along with an overnight bag containing clothes and about $30. Caliendo possessed none of these items when he was taken into custody directly from the car. He told the two deputies that he did not break into the car but that it was unlocked and he crawled inside it to go to sleep.[1/]

The only evidence that Caliendo broke into the car was supplied by a police detective, John Mundell, who testified that Caliendo confessed this to him two days after the arrest, on

---

1. The trial court in Caliendo's second trial applied the hearsay rule to prevent the jury from hearing the deputies' testimony about this statement. The jury in the first trial was permitted to hear the testimony.

July 24, 1995. According to Mundell, Caliendo said that following an argument his wife dropped him off at the intersection near the park and ride lot between 11 p.m. and midnight on the night of his arrest. Mundell testified that Caliendo said he got cold and needed a place to sleep, so he broke the Suburban's window by smashing it three times with a large rock, unlocked the door, crawled inside, and went to sleep. Caliendo denied having a screwdriver in his hand when the deputies found him.

Mundell, an officer with eight years' experience, sat at the prosecution table throughout the trial. He was overheard talking to three jurors in the hallway outside the courtroom for approximately twenty minutes while they waited to enter the courtroom after a lunch recess during deliberations in Caliendo's second trial.

The trial judge immediately conducted an evidentiary hearing. Mundell and the jurors testified that they did not discuss anything related to the trial. The topics of conversation included baseball, eating, a juror's neighbor, Mundell's exercise habits and equipment, and his heavy police workload:

> "THE COURT: Mr. 005, what were you talking about?
>
> JUROR NO. 5: We talked about the amount of paperwork on Detective Mundell's desk top and his exercise regime and the fact that he doesn't have a television in his house where he works out.
>
> THE COURT: Mr. 004, what were you talking about?
>
> JUROR NO. 4: We talked about eating, and he has to pay so much money to eat here all the time, and that he's doing a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer. I was talking about baseball. I was talking about my neighbor. That's it. Just surface talk.

THE COURT: Ms. 022, what were you talking about?

JUROR NO. 9: I asked him how long he thought it would be before we would get back into court to start deliberating."

At the evidentiary hearing, the judge questioned all the jurors one by one as to whether the conversation would influence their judgment or cause them to view Mundell's testimony any differently. All the jurors testified that the conversation would not affect their deliberations.

Caliendo moved for a mistrial. The judge denied the motion as follows:

"THE COURT: [The jurors] have all indicated . . . that the conversation that they had with Detective Mundell will not influence their judgment in this case as to Mr. Caliendo. I will accept their representations. I accept everybody's representation. I've heard no indication whatsoever that anything about the facts of the case or any of the parties in this case were discussed whatsoever. I know what you're saying. It's a very unfortunate situation. It should not have happened but it did happen. Detective Mundell should know better. He certainly should have known better.

"But I will accept the jurors at their word that they will not let whatever conversation they had with Detective Mundell influence their judgment in the case as to whether or not Mr. Caliendo, based upon the evidence that has been introduced here in court, is either guilty or not guilty of these charges. So the motion for a mistrial will be denied."

The jury began deliberating shortly before the noon recess on Thursday, August 8, 1996. During deliberations the jury sent out a note requesting that portions of Mundell's testimony be reread. On Monday, August 12, it returned with a guilty

verdict. The judge denied Caliendo's subsequent motion for a new trial.

Caliendo appealed. The California Court of Appeal observed that the conversation with Mundell was "improper and fraught with the danger of improper influence and communication of extraneous information." Nevertheless, the court rejected Caliendo's juror misconduct claim on the grounds that he had not established actual prejudice on the facts. The California Supreme Court denied review.

Caliendo then filed a petition for writ of habeas corpus. The district court, adopting the report and recommendation of the Magistrate Judge, denied the petition on its merits with prejudice. The report and recommendation emphasized that the improper conversation was an "isolated incident" and did not concern the trial. The district court, however, granted a certificate of appealability with respect to the question whether prejudice should be presumed where three jurors had an improper twenty-minute conversation, factually unrelated to the trial, with a key prosecution witness.

II. STANDARD OF REVIEW

We review *de novo* a district court's decision to deny a habeas petition. *McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003). We review *de novo* allegations of juror misconduct and prejudicial impact in habeas cases. *Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997). We presume state court findings of fact to be correct unless petitioner rebuts them with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), a petitioner for writ of habeas corpus must demonstrate that the state court's adjudication on the merits resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented."

The state court's decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Early v. Packer*, 537 U.S. 3, 8 (2002) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). The state court's decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of the case. *Williams*, 529 U.S. at 407-08.

III. ANALYSIS

Caliendo maintains that the California Court of Appeal's decision was contrary to clearly established Supreme Court law because the court did not presume prejudice in evaluating the impact of the conversation between Detective Mundell and the three jurors. We agree that the state court's analysis was framed erroneously and grant the habeas petition based on our independent review of the record.

[1] More than a century ago, in *Mattox v. United States*, 146 U.S. 140, 142 (1892), the Supreme Court overturned a murder conviction on Sixth Amendment grounds in part because the bailiff had told the jury during deliberations that "this is the third fellow [the defendant] has killed." The *Mattox* Court announced that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 150.

[2] In *Remmer v. United States*, 347 U.S. 227, 228 (1954), the Supreme Court reversed a conviction under *Mattox* when it was shown that during the trial someone had told the jury foreman that he could profit by acquitting the defendant. The Court in *Remmer* held that *Mattox*'s "presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that

such contact with the juror was harmless to the defendant." *Id.* at 229.[2]

We and other circuits have held that *Mattox* established a bright-line rule: Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing. *United States v. Armstrong*, 654 F.2d 1328, 1331-33 (9th Cir. 1981) (upholding guilty verdicts but applying the *Mattox* presumption where a juror's husband had taken two obscene phone calls at home from an unidentified third party who said, "Tell your wife to stop hassling my brother-in-law at court"). *See also United States v. O'Brien*, 972 F.2d 12, 13-15 (1st Cir. 1992) (upholding a guilty verdict but applying the *Mattox* presumption where a police officer who was a potential prosecution witness, but who did not testify, spoke with three jurors during a recess about matters unrelated to the case); *United States v. Williams*, 822 F.2d 1174, 1188 (D.C. Cir. 1987) (upholding a guilty verdict but stating that the *Mattox* presumption is "operable even if the communication at issue consisted only of 'banter' not clearly directed at influencing the jury's verdict"), *superseded on other grounds by rule as stated in United States v. Caballero*, 936 F.2d 1292, 1298-99 (D.C. Cir. 1991); *United States v. Betner*, 489 F.2d 116, 117-19 (5th Cir. 1974) (ordering a new trial under *Mattox* because the prosecutor conversed with the jury panel during a recess and the trial court failed to conduct an adequate hearing).

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2. In *Turner v. Louisiana*, 379 U.S. 466, 473-74 (1965), the Supreme Court applied a conclusive presumption of prejudice to overturn a murder conviction where two deputy sheriffs who provided key testimony relating to substantive evidence of the defendant's guilt were engaged in "a continuous and intimate association" with the jury throughout the trial. *Turner* and its progeny do not apply directly to our analysis because the intrinsic contact in this case was neither continuous nor intimate. Still, *Turner* informs our analysis to the extent it held that an extrinsic contact with a juror need not relate to the trial in order to create the potential for prejudice.

The *Mattox* rule serves an important function in our system of justice. It protects and safeguards defendants' Sixth Amendment rights to a fair trial and to confront and cross-examine witnesses. *See Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (applying the *Mattox* rule to a civil action and stating that the "harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy with the party and reflecting poorly on the jury system"); *Agnew v. Leibach*, 250 F.3d 1123, 1133 (7th Cir. 2001) (because of an extrinsic contact, the jury "had the opportunity to develop confidence in [the witness's] word in ways that were not subject to cross-examination or the right of confrontation"); *United States v. Harry Barfield Co.*, 359 F.2d 120, 124 (5th Cir. 1966) ("Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided.").

At the same time, the Supreme Court has recognized that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Indeed, "certain chance contacts between witnesses and jury members–while passing in the hall or crowded together in an elevator–may be inevitable." *Gonzales v. Beto*, 405 U.S. 1052, 1058, 1055 (1972) (memorandum dissent and concurrence). Given this reality, if an unauthorized communication with a juror is *de minimis*, the defendant must show that the communication could have influenced the verdict before the burden of proof shifts to the prosecution. "A defendant must offer sufficient evidence to trigger the presumption of prejudice . . ." *United States v. Day*, 830 F.2d 1099, 1103-04 (10th Cir. 1987) (a juror and a federal agent who sat at the prosecutor's table exchanged a "casual, time-of-the-day greeting" in the men's room). (*See also Lee v. Marshall*, 42 F.3d 1296 (9th Cir. 1994) (two police officers, one of them the investigating officer in the case, entered the jury room during deliberations without the court's permission to set

up a VCR to replay a witness's testimony); *Johnson v. Wainwright*, 778 F.2d 623 (11th Cir. 1985) (sheriff had a dual role as bailiff and assistant to the prosecution); *Helmick v. Cupp*, 437 F.2d 321 (9th Cir. 1971) (three arresting sheriff's deputies, one of them a prosecution witness, drove the jurors to the scene of the crime after being designated by the trial court as bailiffs for that purpose).

[3] The *Mattox* rule applies when an unauthorized communication with a juror crosses a low threshold to create the potential for prejudice. A communication is possibly prejudicial, not *de minimis*, if it raises a risk of influencing the verdict. Prejudice is presumed under these circumstances, and the defendant's motion for a new trial must be granted unless the prosecution shows that there is no reasonable possibility that the communication will influence the verdict. *See O'Brien*, 972 F.2d at 14; *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999).[3/]

The California Court of Appeal did not identify or apply the clearly established *Mattox* rule. The court relied on the California Supreme Court's decision in *People v. Cobb*, 45 Cal.2d 158 (1955), to hold that no presumption of prejudice applied in Caliendo's case because the improper conversation did not directly relate to the trial. Instead of requiring the government to clearly establish that no prejudice resulted from the incident, the court placed the burden on the defendant to prove prejudice. In an unpublished opinion, the court found that he had not done so. "The record as a whole discloses no reasonable probability of actual harm to appellant," the Court of Appeal concluded. "No topic discussed by Mundell and Jurors 4 or 5 had any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be

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3. Despite the government's contention, the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), did not signal a retreat from *Mattox*'s well-settled rule. The Court in *Olano* merely commented that whether or not a rebuttable or conclusive presumption of prejudice applies in a case involving an intrusion upon a jury, a reviewing court is required to evaluate the actual extent of prejudice. *Id.* at 738-39.

influenced by the conversation between Mundell and members of the jury."

[4] The state court's failure to presume prejudice on this record was contrary to *Mattox*. The *Mattox* Court spoke in categorical terms, mandating that "possibly prejudicial" out-of-court communications between jurors and outside parties "invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 150. Nothing in *Mattox* suggests that for the rebuttable presumption of prejudice to attach, the substance of the extrinsic contact must factually relate to the trial. Rather, "[i]n questions about jury incidents, we are ultimately not so concerned with their nature as with the prejudice they may have worked on the fairness of the defendant's trial." *Armstrong*, 654 F.2d at 1332; *see Rodriguez*, 125 F.3d at 744 n.4.

Whether an unauthorized communication between a juror and a third party concerned the case is but one factor in determining whether the communication raised a risk of influencing the verdict. Other factors may include the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction. In weighing these factors we generally accord some deference to the findings of the trial judge, who is in the best position to determine whether possibly prejudicial misconduct took place, and, if so, whether the government clearly established harmlessness. *See Williams*, 822 F.2d at 1188-89. But no deference is warranted where, as here, an extrinsic contact was possibly prejudicial but the trial judge neglected to hold the government to its heavy burden of proving that the contact was clearly not prejudicial.[4]

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4. "[W]hen jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate

[5] This contact was possibly prejudicial because Detective Mundell was a critical prosecution witness and his interaction with multiple jurors lasted for twenty minutes. Although the conversation did not directly concern the trial, it went beyond "a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy." *Harry Barfield*, 359 F.2d at 124. Mundell's recollection of Caliendo's confession was the only evidence that Caliendo broke into the car, and the case was close enough that Caliendo's first jury hung. The Magistrate Judge's report recognized that the unauthorized communication between Mundell and the jurors created the "potential for prejudice." Thus, because the communication raised a risk of prejudice, the California Court of Appeal's failure to apply a rebuttable presumption of prejudice was contrary to the governing law set forth by the Supreme Court in *Mattox*.

The state courts determined that no prejudice resulted from the incident, yet we may not defer to this finding. AEDPA's presumption of correctness does not apply to state court findings arrived at through the use of erroneous legal standards. *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002). The state appellate court employed an incorrect standard when it placed the burden of proof on the defendant instead of the government. The state trial court conducted an evidentiary hearing, consistent with *Remmer*, 347 U.S. at 229-30, and denied the defendant's motions for mistrial and new trial with a finding that the improper conversation did not influence the jurors. But the trial judge failed to presume prejudice in his rulings, so "we need not–indeed, should not–give deference" to his finding on prejudice–a mixed question of law and fact. *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000). We review *de novo* whether the government showed that there was no reasonable possibility that the communication influenced the verdict.

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specificity for meaningful appellate review." *United States v. McKinney*, 429 F.2d 1019, 1026 (5th Cir. 1970).

[6] We hold that the government did not make a strong showing that the contact between Detective Mundell and the three jurors was harmless. While the twenty-minute conversation was seemingly innocuous, the case was close. And it turned on the detective's credibility. The jury even requested a read-back of Mundell's testimony as to damaging statements Caliendo had allegedly made to him. The report and recommendation adopted by the district court noted that "some evidence suggested that the car may have already been broken into before Petitioner entered it, that is, none of the missing property was found at the scene or in Petitioner's possession when he was taken into custody directly from the vehicle." Given the conflicting evidence in Caliendo's case and the centrality of Mundell's testimony to the prosecution, the jurors' claims that the encounter would not influence them did not suffice to meet the government's heavy burden of proving harmlessness. The prejudicial effect of an extrinsic contact "may be substantial even though it is not perceived by the juror, and 'a juror's good faith cannot counter this effect.'" *Jeffries v. Wood*, 114 F.3d 1484, 1491 (9th Cir. 1997) (*en banc*) (*quoting United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978)).

At Caliendo's first trial seven jurors voted to acquit. At his second trial three deliberating jurors chatted amiably and at length with the critical prosecution witness in an uncontrolled setting. Detective Mundell discussed his heavy workload with the three jurors and established common ground with them. After the conversation Juror 4 expressed a positive view of the detective: "We talked about . . . that he's doing a good job as an officer."

[7] The government failed to clearly establish that the improper conversation did not affect the verdict by bolstering the detective's credibility or "creating juror empathy." *Rinker*, 724 F.2d at 1354. We therefore conclude that Caliendo must be released or granted a new trial within seventy days of the issuance of this Court's mandate.

REVERSED AND REMANDED.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY DEAN CALIENDO, *Petitioner-Appellant,* v. WARDEN OF CALIFORNIA MEN'S COLONY, *Respondent-Appellee.*	No. 01-56946 D.C. No. CV-99-07263-R Central District of California, Los Angeles ORDER WITHDRAWING OPINION AND DENYING PETITION FOR REHEARING EN BANC

Filed April 5, 2004

Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain, and M. Margaret McKeown, Circuit Judges.

ORDER

The opinion filed on January 9, 2004, is hereby withdrawn in its entirety and replaced with a new opinion.

The panel has voted to deny appellant's petition for panel rehearing. Judges O'Scannlain and McKeown have voted to deny the petition for rehearing en banc and Judge Hall has recommended denial. The full court has been advised of the

petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.-

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY DEAN CALIENDO,

Petitioner-Appellant,

v.

WARDEN OF CALIFORNIA MEN'S COLONY,

Respondent-Appellee.

No. 01-56946

D.C. No.
CV-99-7263-R

OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
November 5, 2003---Pasadena, California

Filed January 9, 2004

Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain,
and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Hall

COUNSEL

Kenneth M. Miller, San Clemente, California, for the appellant; Gregory Dean Caliendo, pro se, petitioner-appellant.

Michael R. Johnsen and David F. Glassman, Deputies Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

HALL, Circuit Judge:

Petitioner Gregory Caliendo appeals the district court's denial of his petition for writ of habeas corpus. He contends that the California Court of Appeal's decision upholding his conviction was contrary to Supreme Court precedent because the court did not presume prejudice from an incident of juror misconduct. A detective who provided testimony that was crucial to the prosecution's case had a twenty-minute conversation, unrelated to the trial, with three jurors in the hallway during a break in deliberations. Caliendo also claims his sentence amounted to cruel and unusual punishment under the Eighth Amendment.

We exercise jurisdiction under 28 U.S.C. § 2253 and 28 U.S.C. § 1291. On the juror misconduct question, we hold that the state appellate court's decision was contrary to *Mattox v. United States*, 146 U.S. 140 (1892), in that the court did not apply a rebuttable presumption of prejudice, but we nevertheless affirm the district court's denial of the habeas petition because the government successfully rebutted the *Mattox* presumption. In addition, we affirm the district court's denial of relief on the Eighth Amendment question.

I. FACTS

After a Los Angeles County Superior Court jury convicted him of second-degree auto burglary in violation of California Penal Code section 459, Caliendo was sentenced to a state prison term of twenty-five years to life in accordance with California's three strikes law. His conviction resulted from a second trial; the jury in Caliendo's first trial hung 7-5 in favor of acquittal.

The central issue at both trials was whether Caliendo broke into a locked parked car–an essential element of auto burglary–or whether the car had previously been broken into when he entered it. Caliendo was arrested at 12:30 a.m. on July 22, 1995. Two sheriff's deputies noticed someone sitting in the passenger seat of a GMC Suburban in a park and ride lot. Moments later, the deputies shined a spotlight on the car, approached it on foot, and illuminated the interior with their flashlights. They reported seeing Caliendo lying on his side with his head under the driver's side dashboard and a screwdriver in his right hand. A window on the passenger side was broken. The front and back doors on the passenger side were unlocked. After Caliendo stepped out of the vehicle, the deputies found the screwdriver and a large rock on the floor. The vehicle had been parked there for two days. When the owner was shown his car in the impound lot, he said that the rear right speaker had been unscrewed and that the car's sun visors and light bar were missing, along with an overnight bag containing clothes and about $30. Caliendo possessed none of these items when he was taken into custody directly from the car. He told the two deputies that he did not break into the car but that it was unlocked and he crawled inside it to go to sleep.[1/]

The only evidence that Caliendo broke into the car was supplied by a police detective, John Mundell, who testified that Caliendo confessed this to him two days after the arrest, on

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1. The trial court in Caliendo's second trial applied the hearsay rule to prevent the jury from hearing the deputies' testimony about this statement. The jury in the first trial was permitted to hear the testimony.

July 24, 1995. According to Mundell, Caliendo said that following an argument his wife dropped him off at the intersection near the park and ride lot between 11 p.m. and midnight on the night of his arrest. Mundell testified that Caliendo said he got cold and needed a place to sleep, so he broke the Suburban's window by smashing it three times with a large rock, unlocked the door, crawled inside, and went to sleep. Caliendo denied having a screwdriver in his hand when the deputies found him.

Mundell was overheard talking to three jurors in the hallway outside the courtroom for approximately twenty minutes while they waited to enter the courtroom after a lunch recess during deliberations in Caliendo's second trial.

The trial judge immediately conducted an evidentiary hearing. Mundell and the jurors testified that they did not discuss anything related to the trial. The topics of conversation included baseball, eating, a juror's neighbor, Mundell's exercise habits and equipment, and his heavy police workload:

> "THE COURT: Mr. 005, what were you talking about?
>
> JUROR NO. 5: We talked about the amount of paperwork on Detective Mundell's desk top and his exercise regime and the fact that he doesn't have a television in his house where he works out.
>
> THE COURT: Mr. 004, what were you talking about?
>
> JUROR NO. 4: We talked about eating, and he has to pay so much money to eat here all the time, and that he's doing a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer. I was talking about baseball. I was talking about my neighbor. That's it. Just surface talk.

> THE COURT: Ms. 022, what were you talking about?
>
> JUROR NO. 9: I asked him how long he thought it would be before we would get back into court to start deliberating."

At the evidentiary hearing, the judge questioned all the jurors one by one as to whether the conversation would influence their judgment or cause them to regard Mundell's testimony any differently. All the jurors testified that encounter would not affect their deliberations.

The judge denied the defendant's subsequent motion for a mistrial as follows:

> "THE COURT: [The jurors] have all indicated . . . that the conversation that they had with Detective Mundell will not influence their judgment in this case as to Mr. Caliendo. I will accept their representations. I accept everybody's representation. I've heard no indication whatsoever that anything about the facts of the case or any of the parties in this case were discussed whatsoever. I know that you're saying. It's a very unfortunate situation. It should not have happened but it did happen. Detective Mundell should know better. He certainly should have known better.
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> "But I will accept the jurors at their word that they will not let whatever conversation they had with Detective Mundell influence their judgment in the case as to whether or not Mr. Caliendo, based upon the evidence that has been introduced here in court, is either guilty or not guilty of these charges. So the motion for a mistrial will be denied."

The jury began deliberating shortly before the noon recess on Thursday, August 8, 1996. During deliberations the jurors sent out a note requesting that portions of Mundell's testimony be

reread. On Monday, August 12, it returned with a guilty verdict.

Caliendo appealed. The California Court of Appeal observed that the conversation with Mundell was "improper and fraught with the danger of improper influence and communication of extraneous information." Nevertheless, the court rejected Caliendo's juror misconduct claim on the grounds that he had not established actual prejudice on the facts. The California Supreme Court denied review.

Caliendo then filed a petition for writ of habeas corpus. The district court, adopting the report and recommendation of the Magistrate Judge, denied the petition on its merits with prejudice. The report and recommendation emphasized that the improper conversation was an "isolated incident" and did not concern the trial. The district court, however, granted a certificate of appealability with respect to the question whether prejudice should be presumed where three jurors had an improper twenty-minute conversation, factually unrelated to the trial, with a key prosecution witness.

II. STANDARD OF REVIEW

We review *de novo* a district court's decision to deny a habeas petition. *See Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003). We also review *de novo* allegations of juror misconduct and prejudicial impact in habeas cases. *See Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997); *Thompson v. Borg*, 74 F.3d 1571, 1573 (9th Cir. 1996). We presume state court findings of fact to be correct unless the petitioner rebuts them with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), a petitioner for writ of habeas corpus must demonstrate that the state court's adjudication on the merits resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable

determination of the facts in light of the evidence presented." The state court's decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Early v. Packer*, 123 S.Ct. 362, 365 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). The state court's decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of the case. *See Williams*, 529 U.S. at 407-08.

III. DISCUSSION

A. *Juror misconduct claim*

Petitioner Caliendo argues that the California Court of Appeal's decision was contrary to clearly established Supreme Court law because the court did not presume prejudice in evaluating the impact of the conversation between Detective Mundell and the three jurors. We agree that the state court's analysis was framed erroneously, but we uphold the denial of Caliendo's habeas petition on the basis of the trial court's findings and our analysis of the record.

[1] More than a century ago, in *Mattox v. United States*, 146 U.S. 140, 142 (1892), the Supreme Court overturned a murder conviction on Sixth Amendment grounds in part because the bailiff had told the jury during deliberations that "this is the third fellow [the defendant] has killed." The *Mattox* Court announced that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 150.

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foreman that he could profit by acquitting the defendant. The Court in *Remmer* held that *Mattox*'s "presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* at 229.[2/]

Lower federal courts have held that *Mattox* established a bright-line rule that any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but that the government may overcome the presumption with a strong contrary showing. *See United States v. O'Brien*, 972 F.2d 12, 13-15 (1st Cir. 1992) (upholding a guilty verdict but applying the *Mattox* presumption where a police officer who was a potential prosecution witness, but who did not testify, spoke with three jurors during a recess about matters unrelated to the case); *United States v. Williams*, 822 F.2d 1174, 1188 (D.C. Cir. 1987) (upholding a guilty verdict but stating that the *Mattox* presumption is "operable even if the communication at issue consisted only of 'banter' not clearly directed at influencing the jury's verdict"); *United States v. Armstrong*, 654 F.2d 1328, 1331-33 (9th Cir. 1981) (upholding guilty verdicts but applying the *Mattox* presumption where a juror's husband had taken two obscene phone calls at home from an unidentified third party who said, "Tell your wife to stop hassling my brother-in-law at court"); *United States v. Betner*, 489 F.2d 116, 117-19 (5th Cir. 1974) (ordering a new trial under *Mattox* because the prosecutor conversed with the jury panel during a recess and the trial court failed to conduct an adequate hearing).

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2. In *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), the Supreme Court applied a conclusive presumption of prejudice to overturn a murder conviction where two deputy sheriffs who provided key testimony relating to substantive evidence of the defendant's guilt were engaged in "a continuous and intimate association" with the jury throughout the trial. *Turner* and its progeny do not apply directly to this analysis because the improper contact in question was neither continuous nor intimate. Still, *Turner* informs this analysis to the extent it held that unauthorized communications with jurors need not relate to the trial in order to cause the potential for prejudice.

Lower courts have explained that the Mattox rule safeguards defendants' Sixth Amendment rights to a fair trial and to confront and cross-examine witnesses. *See Agnew v. Leibach*, 250 F.3d 1123, 1133 (7th Cir. 2001) (because of improper contact, the jury "had the opportunity to develop confidence in [the witness's] word in ways that were not subject to cross-examination or the right of confrontation"); *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (applying the *Mattox* rule to a civil action and recognizing that the "harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy with the party and reflecting poorly on the jury system"); *United States v. Harry Barfield Co.*, 359 F.2d 120, 124 (5th Cir. 1966) (declaring that "[o]ur system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration.").

In cases where improper contact with jurors has been *de minimis*, courts have departed from *Mattox* and placed the burden on the defendant to establish actual prejudice. These cases demonstrate that if the contact does not raise even a risk of influencing the verdict, the *Mattox* presumption does not come into effect. *See United States v. Day*, 830 F.2d 1099, 1103 (10th Cir. 1987) (stating that "[a] defendant must offer sufficient evidence to trigger the presumption of prejudice"); *see, e.g., Lee v. Marshall*, 42 F.3d 1296 (9th Cir. 1994) (two police officers, one of them the investigating officer in the case, entered the jury room during deliberations without the court's permission to set up a VCR to replay a witness's testimony); *Johnson v. Wainwright*, 778 F.2d 623 (11th Cir. 1985) (sheriff had a dual role as bailiff and assistant to the prosecution); *Helmick v. Cupp*, 437 F.2d 321 (9th Cir. 1971) (three arresting sheriff's deputies, one of them a prosecution witness, drove the jurors to the scene of the crime after being designated by the trial court as bailiffs for that purpose).

[3] The line of cases, however, applies only to juror misconduct which is *de minimis*, as opposed to misconduct which creates the potential for prejudice. The *Mattox* presumption applies when an unauthorized communication with

a juror is possibly prejudicial in light of the totality of the circumstances.[3]

The California Court of Appeal did not identify or apply the clearly established *Mattox* rule. The court relied on the California Supreme Court's decision in *People v. Cobb*, 45 Cal.2d 158 (1955), to hold that no presumption of prejudice applied in Caliendo's case because the improper conversation did not directly relate to the trial. Instead of requiring the government to clearly establish that no prejudice resulted from the incident, the court placed the burden on the defendant to prove prejudice. In an unpublished opinion, the court found that he had not done so. "The record as a whole discloses no reasonable probability of actual harm to appellant," the Court of Appeal concluded. "No topic discussed by Mundell and Jurors 4 or 5 had any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be influenced by the conversation between Mundell and members of the jury."

[4] The state court's failure to presume prejudice on this record was contrary to *Mattox*. The *Mattox* Court spoke in categorical terms, mandating that "possibly prejudicial" out-of-court communications between jurors and outside parties invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 150. Nothing in *Mattox* suggests that for the rebuttable presumption of prejudice to attach, the substance of the improper contact must relate to the trial. Rather, as we have previously noted, "[i]n questions about jury incidents, we are ultimately not so concerned with their nature as with the prejudice they may have worked on the fairness of the defendant's trial." *Armstrong*, 654 F.2d at 1332.

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3. Despite the government's contention, the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), did not signal a retreat from *Mattox*'s well-settled rule. The Court in *Olano* merely commented that whether or not a rebuttable or conclusive presumption applies in a case involving an intrusion upon a jury, a reviewing court is required to evaluate the actual extent of prejudice. *See id.* at 739; *Lee*, 42 F.3d at 1298-99.

Whether an unauthorized communication between a juror and a third party concerned the case is but one factor in determining whether the communication raised a risk of tainting the verdict. Other factors may include the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction. In weighing these factors we accord some deference to the findings of the trial judge, who is in the best position to determine whether possibly prejudicial misconduct took place, and, if so, whether the government clearly established harmlessness.[4/]

[5] This improper contact was possibly prejudicial because Mundell was a critical prosecution witness and his interaction with multiple jurors lasted for 20 minutes. Although the conversation did not directly concern the trial, the misconduct–like the juror misconduct in *Harry Barfield*–went beyond "a mere inadvertent or accidental conduct involving only an exchange of greeting in order to avoid an appearance of discourtesy." *Harry Barfield*, 359 F.2d at 124; *see also Day*, 830 F.2d at 1104 (a juror and a federal agent who sat at the prosecutor's table exchanged a casual, time-of-the-day greeting" in the men's room). Mundell's recollection of Caliendo's confession was the only evidence that Caliendo broke into the car, and the case was close enough that Caliendo's first jury hung. The Magistrate Judge's report recognized that the improper contact between Mundell and the jurors created the "potential for prejudice." Thus, because the misconduct raised

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4. "[W]hen jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review." *United States v. McKinney*, 429 F.2d 1019, 1026 (5th Cir. 1970); *see also United States v. Williams*, 822 F.2d 1174, 1188-89 (D.C. Cir. 1987); *United States v. O'Brien*, 972 F.2d 12, 14 (1st Cir. 1992)..

a risk of prejudice, the California Court of Appeal's failure to apply a rebuttable presumption of prejudice was contrary to the governing law set forth by the Supreme Court in *Mattox*.

While the state courts determined that no prejudice resulted from the incident, we may not simply defer to this finding. AEDPA's presumption of correctness does not apply to state court findings arrived at through the use of erroneous legal standards. *See Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002); *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000). The state appellate court employed an incorrect standard when it placed the burden of proof on the defendant instead of the government. We therefore review *de novo* the correct question of whether the government met its heavy burden of proof under *Mattox* and *Remmer*. *See Thompson*, 74 F.3d at 1573.

[6] We hold that the government rebutted the *Mattox* presumption by making a strong showing that the contact between Mundell and the three jurors was harmless. "[T]he innocuous nature of a contact will have great bearing on the question whether prejudice has actually occurred." *Williams*, 822 F.2d at 1188 n.147. Although the detective's credibility was a key issue, ultimately, as the California Court of Appeal observed, "[n]o topic discussed by Mundell and Jurors 4 or 5 had any tendency to reflect upon or bolster Mundell's credibility." The trial judge, who is best equipped to evaluate matters of prejudice, conducted an evidentiary hearing consistent with *Remmer*, 347 U.S. at 229-30, and denied the defendant's motion for a mistrial with a finding that the jurors would not be influenced by the improper conversation. We accord considerable deference to this finding. *See Armstrong*, 654 F.2d at 1332. Four important facts supported the trial court's ruling: (1) the contact between Mundell and the jurors was a one-time encounter; (2) nothing related to the facts of the case or the parties involved was discussed; (3) the judge admonished the jurors not to allow the encounter to influence their judgment; and (4) all the jurors said that their judgment would not be influenced by the encounter. Significantly, the jury did not rush to judgment but deliberated for two and one-half days.

[7] We are satisfied that the government clearly established lack of prejudice. Consequently, we affirm the district court's denial of relief.

B. *Eighth Amendment claim*

Caliendo also argues that his sentence of twenty-five years to life constitutes cruel and unusual punishment under the Eighth Amendment. This argument is foreclosed by the Supreme Court's decision in *Lockyer v. Andrade*, 123 S.Ct. 1166 (2003).

AFFIRMED.

APPENDIX F

FILED
SEP 7 2001
ENTERED
SEP 10 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREGORY DEAN CALIENDO,	**No. CV-99-7263-R (JWJ)**
Petitioner,	
vs.	**JUDGMENT**
WARDEN OF CALIFORNIA MEN'S COLONY, et al.	
Respondent.	

Pursuant to the Order of the Court adopting the recommendations of the United States Magistrate Judge, and adopting the same as the facts and conclusions of law herein,

IT IS ADJUDGED that Judgment be entered denying the instant Petition and dismissing it with prejudice.

Dated: Sept. 7, 2001

/S/
HONORABLE MANUEL L. REAL
United States District Judge

APPENDIX G

FILED
SEP 7 2001
ENTERED
SEP 10 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREGORY DEAN CALIENDO,	)	No.
	)	CV-99-7263-R
Petitioner,	)	(JWJ)
	)	
vs.	)	ORDER
	)	ADOPTING
WARDEN OF CALIFORNIA	)	REPORT AND
MEN'S COLONY, et al.,	)	RECOMMENDA-
	)	TION OF UNITED
Respondent.	)	STATES
	)	MAGISTRATE
	)	JUDGE

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the instant Petition along with the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation.

IT IS ORDERED that a Judgment be issued denying the instant Petition and dismissing it with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order and the Judgment of this date on counsel for Petitioner and Respondent

Dated: Sept. 7, 2001

/S/
HONORABLE MANUEL L. REAL
United States District Judge

APPENDIX H

FILED
JUL 11 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREGORY DEAN CALIENDO,	)	No.
	)	CV-99-7263-R
Petitioner,	)	(JWJ)
	)	
vs.	)	REPORT AND
	)	RECOMMENDA-
WARDEN OF CALIFORNIA	)	TION OF UNITED
MEN'S COLONY, et al.,	)	STATES
	)	MAGISTRATE
Respondents.	)	JUDGE
	)	

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and dismissed with prejudice.

I. SUMMARY OF PROCEEDINGS

On July 15, 1999, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). On October 26, 1999, Respondent filed an Answer arguing that the Petition should be dismissed on procedural grounds. On July 20, 2000, the Court found that the Petition was exhausted and not procedurally defaulted and ordered Respondent to answer its merits. Respondent filed a Supplemental Answer to the Petition on August 18, 2000. Petitioner filed a Traverse to the Supplemental Answer on September 7, 2000.

II. BACKGROUND

On August 12, 1996, a Los Angeles County Superior Court jury convicted Petitioner of second degree burglary of a vehicle in violation of California Penal Code § 459. (Clerk's Transcript ("C.T.") 152). The court sentenced Petitioner under California's Three Strikes law to twenty-five years to life in state prison. (C.T. 192-94).

Petitioner appealed his conviction to the California Court of Appeal which affirmed the conviction on March 31, 1998. (Answer, Exh.C). Petitioner filed a Petition for Review in the California Supreme Court which the court denied on July 15, 1998. (Answer, Exh. E).

III. DISCUSSION

A. Standard of Review

Because the Petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), it must be reviewed under the AEDPA's provisions. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The relevant portions of the AEDPA provide as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Under the AEDPA, a federal court shall presume that a determination of factual issues made by a state

court is correct, and Petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Supreme Court has explained the standard of review under the AEDPA as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Ninth Circuit has held that "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

Under the AEDPA, circuit law "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help [a federal habeas court] determine what law is 'clearly established.'" Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000) (quoting Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000)). However, "only the Supreme court's holdings are binding on the state courts and only those holdings need be 'reasonably' applied." Id.

In reviewing a habeas petition, the Court will examine an explicated California Court of Appeal opinion under the AEDPA where the California Supreme Court opinion denies the same claims without discussion because "where there has been one reasoned state court judgment rejecting a federal claim, [federal habeas courts should presume that] later unexplained

orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 2594, 115 L.Ed.2d 706 (1991).

B. Improper Contact between Prosecution Witness and Jury

Petitioner's first claim is that his due process rights were violated when "[d]uring jury deliberations the investigating officer in the case, Officer M[u]ndell, had a twenty minute conversation with three jurors which several other jurors overheard. The conversation included, but was not limited to, the Officer's current workload and the fact that the Officer was doing a good job." (Petition, 6). The Court of Appeal denied Petitioner's claim as follows:

> Just after the jury began deliberating, defense counsel noticed several jurors talking to Detective Mundell in the hallway "for approximately 15 minutes." Outside of the presence of the jury, Mundell admitted that he had conversed with one to three jurors after one of the jurors stated, "You're awfully busy in here." Mundell told the court that he and the jurors had not discussed anything pertaining to the case, the defendant, the attorneys, or the court, and that they had instead discussed how busy he was, "Cooperstown, baseball, small towns, . . . a lot of small talk but nothing to do with this case. . . ."
>
> When the court asked of the jury which jurors had talked to Mundell, three jurors admitted doing so. Each of the jurors denied talking about the trial, the facts of the case, the witnesses, the evidence, the defendant, the attorneys, the judge, or "anything whatsoever that anybody could say is any discussion about the case or any of the parties connected with the case." Juror 4 told the court that he and Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [soc] to be a cop or officer." Juror 5 told the court that he had talked to Mundell about the amount of paperwork Mundell had to do and Mundell's exercise regimen. Juror 22 (sitting as

juror number 9) said that she had only asked Mundell how long he thought it would be before the jury was let back into the courtroom.

The court asked if any other jurors had overheard the conversation between Mundell and any of their fellow jurors, and several indicated that they had. The court asked each juror individually whether he or she had heard anything other than what the other jurors reported. Each juror said that they had not, except for jurors 8 and 11, who said that heard something about gym equipment. The court then asked each juror individually whether the conversations between Mundell and the jurors would influence his or her judgment in the case. Each juror said that his or her judgment would not be affected. The court repeated its frequent admonishment not to speak to anyone concerning any subject connected with the trial.

An apparently neutral witness to the conversation, Attorney Fefferman, told the court he overheard "a similar conversation" about work and the effect that Mundell's presence in court had on his colleagues' workload.

The court denied [Petitioner's] motion for a mistrial based on jury misconduct, saying that it accepted the juror's and Mundell's representations as to the subject matter and the juror's representations that it would not influence their judgment. [Petitioner] later re-raised the issue in an unsuccessful motion for a new trial.

* * *

In People v. Cobb (1955) 45 Cal.2d 158, the Supreme court held that no presumption of prejudice arose from the mere fact that a juror had a private conversation with a relative of the accused on a topic unrelated to the trial. (Id. at p. 161.) Without mentioning Cobb, the court in People v. Ryner (1985) 164 Cal.App.3d 1075, upon which [Petitioner] relied, held that a presumption of prejudice arose even where the subject of the conversation between a juror and a prosecution witness was unrelated to the pending case. (Id. at p. 1082.) Since Cobb has not been overruled, we are bound to apply it and disregard the

> contradictory holding of Ryner. [Citation.] Accordingly, we do no presume prejudice from the incident.
>
> [Petitioner] has suggested a number of potentially prejudicial effects Mundell's conversation might have had, but the record as a whole discloses no reasonable probability of actual harm to [Petitioner]. Juror 22's question was a trivial inquiry regarding the court's hours. Juror 4 explained the intent of his comment that Mundell was "doing such a good job as an officer" to mean that Juror 4 would not want to have Mundell's job. Thus, rather than expressing admiration for Mundell, the juror was simply saying that police work was necessary, but unenviable. No topic discussed by Mundell and Jurors 4 or 5 had any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be influenced by the conversation between Mundell and members of the jury. [Petitioner] argues that, pursuant to Ryner, the jurors' statements must be disregarded. However, the Ryner court's decision to ignore the juror's statement as based on its belief that Evidence Code section 1150 prohibited the consideration of such statements, even though they were made prior to the verdict. . . . [People v.] Cooper[, 53 Cal.3d 771, 838 (1991)] rejected this proposition.

(Answer, Exh. C-94-95, 97-98).

This Court must review both steps of the state court's analysis under the AEDPA. Specifically, the Court must determine first whether it was reasonable to find that prejudice need not be presumed in this case and second whether it was reasonable to find that no actual prejudice occurred. Although this Court agrees with the California Court of Appeal that "the conversation between the jurors and Mundell was improper and fraught with the danger of improper influence and communication of extraneous information," it nevertheless also agrees with the state courts' ultimate findings that Petitioner was required to show actual prejudice from the improper contact and that he has not done so. (See Answer, Exh. C-97-98).

1. Petitioner is Required to Show Prejudice

The state courts reasonably applied Supreme Court precedent in requiring Petitioner to make a showing of actual prejudice. As the Supreme Court has explained: "[t]here may be cases where an intrusion should be presumed prejudicial," but the Court has "generally . . . analyzed outside intrusions upon the jury for prejudicial impact." United States v. Olano, 507 U.S. 725, 738-39, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Petitioner relies heavily on Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) for the proposition that prejudice should be presumed in this case. In Turner, two deputy sheriffs were in charge of the jury throughout the trial but also testified as key prosecution witnesses. Id., 379 U.S. at 467-68. The Court explained that "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial. . ." Id., 379 U.S. at 473. Therefore, the Court presumed prejudice and reversed the conviction on due process grounds. Id., 379 U.S. 466.

However, it is a reasonable interpretation of Supreme Court authority to distinguish Petitioner's case from Turner, and therefore require a showing of actual prejudice because in Petitioner's case there was only one isolated incident of improper contact, even though Mundell was a central prosecution witness.[1/] Circuit courts have interpreted Turner

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1. Mundell was a key witness because, under California law, in order for a defendant to be guilty of burglary of a vehicle, the vehicle must be locked when the defendant entered it. Cal. Penal Code § 459 ("Every person who enters any . . . vehicle . . . when the doors are locked . . .with intent to commit grand or petit larceny or any felony is guilty of burglary."); In re Lamont R., 200 Cal.App.3d 244, 247 (1988) ("An essential element of vehicular burglary under [Penal Code section 459] is that the vehicle must be locked."). Petitioner did not testify at trial, and the only testimony directly addressing whether Petitioner entered the car while its doors were

and related Supreme Court authority in a similar manner. See e.g. Lee v. Marshall 42 F.3d 1296, 1298-99 (9th Cir. 1994) (requiring showing of prejudice where contact between official and jury is minimal); Helmick v. Cupp, 437 F.2d 321 (9th Cir.) (per curiam) (distinguishing Turner where bailiff's contact with jurors was short-lived and his testimony was not central to the prosecution); Johnson v. Wainwright, 778 F.2d 623, 627 (11th Cir. 1985) ("When either the individual's official contact with the jury or his participation in the prosecution is so minimal in the juror's eyes as to have a de minimis impact on the jury's deliberations for all apparent purposes, some showing of actual prejudice must be made."); compare Agnew v. Leibach, 250 F.3d 1123, 1132-33, 1135 (7th Cir. 2001) (prejudice presumed where bailiff takes charge of jury for one entire day of trial and then provides key prosecution testimony during second day of trial, however "a defendant [must] prove actual prejudice . . . where the bailiff's contact with the jury is de minimis or the bailiff's testimony involves some merely formal aspect of the case.").

Because Mundell's contact with the jurors was minimal (he did not supervise them during the trial or speak with them on a number of occasions), this case can be reasonably distinguished from Turner. Accord Lee, 42 F.3d 1296; Johnson, 778 F.2d 623.

2. No Showing of Actual Prejudice Made

The next question is whether the state courts reasonably determined that no showing of prejudice was made. As the Supreme Court has explained, the "ultimate inquiry [in determining whether prejudice has occurred is:] Did the intrusion affect the jury's deliberations and therefore its verdict?" Olano, 507 U.S. at 739.

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locked came from Detective Mundell who testified that Petitioner made a statement to him at the police station that "the doors were locked on the Suburban, and he picked up a large rock and smashed it against the passenger's wing window three times, and on the third time the window broke. He reached in, unlocked the door, and then he climbed in the Suburban." (Reporter's Transcript ("R.T.") 171).

The state courts made a finding that Petitioner was not prejudiced by the contact because the jurors all stated that they would not be affected by the discussion which did not involve the case in particular. (R.T. 352-57, 359, 361-62; Answer, Exh. C-93, 97-98). The three jurors who spoke with Mundell reported their conversations as follows:

Juror 5: "We talked about the amount of paperwork on Detective Mundell's desk top and his exercise regime and the fact that the he doesn't have a television in this house where he works out."

Juror 4: "We talked about eating, and he has to pay so much money to eat here all the time, and that he's doing a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer. I was talking about baseball. I was talking about my neighbors. That's it. Just surface talk."

Juror 9: "I asked him how long he thought it would be before we would get back into court to start deliberating."

(R.T. 352-53). A witness described what he heard of the conversation as follows: "Basically I heard a similar conversation concerning work and there was some colloquy back and forth between one of the jurors and the officer concerning when he's here his other peers have work to do and each of their workload is affected by people being in court and this, that and the other." (R.T. 359).

Given the fact that the jurors professed their ability to judge the case in a fair manner just as they would have before the conversation and that the conversations did not involve anything about the case specifically, this Court cannot say that it is unreasonable to find that Petitioner was not prejudiced by this conduct.

Notwithstanding the foregoing, this Court recognized the potential for prejudice in the facts of the instant case. Specifically, as the Court noted above, Detective Mundell's

testimony was crucial in determining whether the car was locked when Petitioner entered it (Mundell did not record Petitioner's statement or have Petitioner acknowledge it in writing) and therefore his credibility was an important issue at trial. (See R.T. 169, 202, 273). This is especially true here where some evidence suggested that the car may have already been broken into before Petitioner entered it, that is, none of the missing property was found at the scene or in Petitioner's possession when he was taken into custody directly from the vehicle.[2/] (R.T. 66, 69, 72, 93, 114-18, 130, 145-46). In addition, the jury appeared to question whether the car was locked because it requested read-back of Mundell's testimony as well as that of the arresting officers regarding which doors were locked when they found the car. (R.T. 363-64, 370). Finally, as to the importance of Mundell's testimony, the Court notes that Petitioner was convicted in a re-trial after the jury in his first trial deadlocked (with seven jurors favoring a not guilty verdict) apparently over its determination whether the doors were locked when Petitioner entered the car. (R.T. 14, 19).

However, as explained above, recognition of both the impropriety of Detective Mundell's conversation with deliberating jurors and the theoretical possibility that it could have swayed a jury unfairly is not a basis under the AEDPA for this court to recommend granting the instant petition. There is sufficient support in the record and in the relevant case law for the state courts' finding that Petitioner was not prejudiced by the improper contact between Mundell and the jurors. Therefore, the California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

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2. Petitioner's conviction was the result of a re-trial after his first jury deadlocked. The jury in Petitioner's original trial sent out a note during deliberations asking what items were reported missing from the car and the jury in Petitioner's re-trial sent out a note asking what items were recorded in Petitioner's possession when he was arrested. (R.T. 13, 363).

C. Denial of Confrontation Rights

Petitioner's second claim is that the trial court denied his confrontation rights when it excluded evidence of his statement to police officers as he exited the vehicle that he was only in the car to lie down and get some sleep. (Petition, 6). The trial court excluded the evidence as inadmissible hearsay. (R.T. 107, 148). The written opinion of the Court of Appeal addressed only the state law aspects of this claim and found that the statement did not fall into any state-law hearsay exception. (Answer, Exh. C-99-100).

The Confrontation Clause does not require the admission of a defendant's exculpatory out-of-court statement, rather it protects a defendant's right to cross-examine witnesses in court (i.e., to limit the introduction of out-of-court statements). Ohio v. Roberts, 448 U.S. 56, 62-63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (Confrontation Clause protects right to confront witnesses in court, often by ensuring the exclusion of out-of-court statements); United States v. Lopez-Alvarez, 970 F.2d 583, 587-88 (9th Cir.) (where excluded hearsay evidence is helpful to defense, due process, not confrontation, rights are potentially violated), cert. denied, 506 U.S. 989, 113 S.Ct. 504, 121 L.Ed.2d 440 (1992). However, even to the extent that Petitioner is raising a due process claim, he is not entitled to habeas relief on this ground.

"The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). As the Supreme Court recently explained:

> A defendant's interest in presenting [relevant] evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to

> serve. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998) (internal citations omitted).

> [T]he Constitution leaves to the judges who must make these [evidentiary] decisions wide latitude to exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of "harassment, prejudice or confusion of the issues." [citation omitted]. Moreover, we have never questioned the power of the States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability — even if the defendant would prefer to see that evidence admitted.

Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (internal citations omitted). "[A]ny number of familiar and unquestionably constitutional evidentiary rules [such as hearsay rules] authorize the exclusion of relevant evidence." Montana v. Egelhoff, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion).

There is no requirement "that a defendant must be allowed to put on any evidence he chooses." LeGrand v. Stewart, 133 F.3d 1253, 1266 (9th Cir.) (citation omitted), cert. denied, 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 551 (1998). "Evidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the state interest in efficient judicial process." Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). In a limited context, however, the Supreme Court has found that the exclusion of evidence violates due process where the excluded evidence is highly reliable and relevant to the defense. Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Chambers v. Mississippi, 410 U.S. 284, 300-302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Lopez-Alvarez, 970 F.2d at 588.

Here, the excluded evidence was neither highly reliable or highly relevant. Petitioner's statement to the arresting officers that he was in the car to sleep was a self-serving exculpatory statement which would have been cumulative to evidence of his later, identical statement that he was in the car to sleep, which was presented to the jury through Mundell's testimony and was noted in defense counsel's opening argument and the prosecutor's closing argument. (R.T. 45-46, 172, 268). Therefore, Petitioner's due process rights were not violated by the exclusion of his statement under California's hearsay rules. Taylor, 484 U.S. 400; compare Chambers, 410 U.S. at 302-03 (under the facts of this case, exclusion-of highly reliable and critical defense hearsay evidence violated due process). The California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

D. Reasonable Doubt Jury Instruction

Petitioner's third claim is that the trial court violated his due process rights when it instructed the jury with CALJIC 2.90. (Petition, 6-7). The California Court of Appeal denied this claim as follows:

> [Petitioner] contends the reasonable doubt instruction, CALJIC 2.90,[3] violated due process because it failed to define "an abiding conviction." We have repeatedly rejected such contentions (see, e.g., People v. Godwin (1996) 50 Cal.App.4th 1562, 1571-1572; People v. Torres (1996) 43 Cal.App.4th 1073, 1077-1078; see also People

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3. In relevant part, CALJIC 2.90 provides as follows: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." [See C.T. 128].

> v. Tran (1996) 47 Cal.App.4th 253, 262-263.) For the reasons stated in these cases, [Petitioner's] claim has no merit.

(Answer, Exh. C-100) (footnote in original).

As the Supreme Court has held,

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. . . . Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, . . . the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. . . . Rather, taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.

Victor v. Nebraska , 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citations and internal quotation marks omitted). In reviewing the constitutionality of a challenged jury instruction, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." Id., 511 U.S. at 6 (citing Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

In Victor, the Supreme Court reviewed an earlier version of CALJIC 2.90 which provided:

> "Reasonable doubt" is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel and abiding conviction, to a moral certainty, of the truth of the charge.

CALJIC No. 2.90 (1988). In rejecting a due process challenge to the earlier version of CALJIC 2.90, the Court held that "[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." Victor, 511 U.S. at 14-15 (emphasis added). In other words, CALJIC 2.90, stripped of references to "moral certainty" of guilt, "correctly states the government's burden of proof." This describes precisely the instruction given in Petitioner's case; therefore his due process rights were not violated.

The Ninth Circuit has reached the same conclusion in interpreting Supreme Court law. See Lisenbee v. Henry, 166 F.3d 997, 999-1000 (9th Cir.) (jury instructions cast in terms of "abiding conviction" without reference to "moral certainty" satisfy due process requirement), cert. denied, 528 U.S. 829, 120 S.Ct. 82, 145 L.Ed.2d 70 (1999). The California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

E. Equal Protection Violation

Petitioner's fourth claim is that California's Three Strikes law violates equal protection. (Petition, 7). The California Court of Appeal denied this claim as follows:

> With respect to his equal protection claim, [Petitioner] has failed to show the threshold prerequisite: unequal treatment of persons who are similarly situated. (In re Eric J. (1979) 25 Cal.3d 522, 530.) A defendant convicted of one crime is not similarly situated to a defendant convicted of a different crime (People v. Jacobs (1984) 157 Cal.App.3d 797, 800, 803), and a recidivist previously convicted of a serious or violent felony is not similarly situated to a recidivist previously convicted of a nonserious, nonviolent felony, in that the former has previously demonstrated a much greater danger to society than the latter. (People v. Cooper [(1996) 43 Cal.App.4th

> 815, 828].) Thus, the alleged disparities between the Three Strikes Law's effect on [Petitioner] and his hypothetical escalating recidivist do not implicate the equal protection clause. (Id. at pp. 828-830; People v. Kilborn [(1996) 41 Cal.App.4th 1325, 1330-1332].)

(Answer, Exh. C-101).

Equal protection analysis may be invoked when two groups of similarly situated individuals are treated differently. Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996); Freeman v. Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995). However, unless the classification which separates the two groups is one which has been found to be suspect, the justification for such classification need only be reasonably related to a legitimate state interest to satisfy the Fourteenth Amendment. Romer, 517 U.S. at 631.

Petitioner is not entitled to relief on this claim because the distinction between those sentenced under Three Strikes and those sentenced under other sentencing guidelines is not one that the Court has found to be suspect. See, Romer, 517 U.S. at 629 (noting that the Court has applied heightened scrutiny when examining classifications based on sex, illegitimacy, race and ancestry). In rejecting equal protection challenges to "Three Strikes," California courts have found a legitimate state interest behind its classification of prisoners.

> The [California] Legislature stated its intent in modifying section 667 was "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) It is clear the Legislature intended to set . . . recidivists with prior "strike" convictions apart from first time offenders and those with less serious criminal histories; it is equally clear that it did so with a legitimate objective in mind.

People v. Spears, 40 Cal.App.4th 1683, 1687 (1995). Distinguishing between recidivist and non-recidivist criminals in the severity of sentencing is rationally related to meeting this

legitimate state interest. Thus, the rational basis test is met, and there is no equal protection violation. Romer, 517 U.S. at 631. The California courts' denial of this claim was not contrary to, and did involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

F. Cruel and Unusual Punishment

Petitioner's final claim is that his sentence of twenty-five years to life under "Three Strikes" constitutes cruel and unusual punishment. (Petition, 7(c)). The California Court of Appeal denied this claim finding that Petitioner's sentence was based on his status as a recidivist and that under the Supreme Court's Eighth Amendment jurisprudence, Petitioner's sentence was not "grossly disproportionate" to the crime. (Answer, Exh. E-102-03). In denying this claim, the court found that Petitioner "had prior convictions for grand theft auto (two), grand theft property, preventing or dissuading a witness by threat or force, trespass with injury to property, second degree burglary, and using or being under the influence of a controlled substance. He had spent many years in prison and was on parole for the 1989 robbery conviction at the time he committed the current offense." (Id., at 103).

Although twenty-five years to life is a lengthy sentence, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." Solem v. Helm, 463 U.S. 277, 289-90, 103 S.Ct. 3001, 3009, 771 L.Ed.2d 637 (1983) (citation omitted). The Ninth Circuit has interpreted Supreme Court holdings to find that "only extreme sentences that are grossly disproportionate to the crime" violate the Constitution. United States v. Bland, 961 F.2d 123, 129 (9th Cir.), (quoting Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 2705, 115 L.Ed.2d 836 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring)), cert. denied, 506 U.S. 858, 113 S.Ct. 170, 121 L.Ed.2d 117 (1992). Weighing against a finding of disproportionality is California's legitimate state interest "'in

dealing in a harsher manner with those who [are] repeat[] criminal[s].'" Bland, 961 F.2d at 129 (quoting Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980)).

As the California Court of Appeal found, petitioner has a lengthy criminal record and is the type of repeat offender that California's "Three Strikes" law is meant to punish more harshly than others. His sentence does not give rise to an inference of disproportionality. See e.g. Harmelin, 501 U.S. at 961, 996, 111 S.Ct. at 2684, 2702 (upholding life sentence without parole for first offense of possession of 672 grams of cocaine); United States v. Carr, 56 F.3d 38, 39 (9th Cir.) (sentence of 262 months for conviction of sale of 66.92 grams of cocaine with enhancement for two prior convictions does not raise inference of gross disproportionality), cert. denied, 516 U.S. 895, 116 S.Ct. 248, 133 L.Ed.2d 173 (1995).

The California courts' denial of this claim was not contrary to, and did no involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

IV. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation and (2) directing that the Petition be denied and dismissed with prejudice.

DATED: July 11, 2001

/S/
JEFFREY W. JOHNSON
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX I

FILED
JUL 15 1998

Second Appellate District, Division Seven, No. B107229
S070102

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent —

v.

GREGORY DEAN CALIENDO, Appellant

Appellant's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX J

FILED
MAR 31 1998

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GREGORY DEAN CALIENDO, Defendant and Appellant.	B107229 (Super. Ct. No. PA020568

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Conviction affirmed; sentence is affirmed as modified.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, James William Bilderback II and Sergio Bent, Deputys Attorney General, for Plaintiff and Respondent.

SUMMARY

Here we affirm appellant's second degree burglary conviction based upon his capture inside a car he had broken into. While a prosecution witness and several jurors erred by conversing with one another, prejudice was neither presumed nor shown because the conversation did not pertain to the trial, the facts of the case, the parties or participants, or the witness's credibility. The trial court properly prevented the arresting officers from testifying to a statement made by appellant as he got out of the car—the statement was hearsay, did not qualify for admission as an excited utterance or contemporaneous declaration, and was not being introduced for purposes of impeachment. Because CALJIC 2.90 accurately defines reasonable doubt for the jury, the trial court properly used it to instruct the jury. The Three Strikes Law's requirement that the prosecutor plead and prove all prior serious or violent felony convictions does not violate the state Constitution's separation of powers provision, and the law's specification of longer sentences for recidivists whose current offenses are not serious or violent felonies violates neither due process nor equal protection principles.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's first trial ended in a mistrial after jury deadlocked.

The evidence at the second trial is summarized as follows:

Kevin Gannon parked and locked his GMC Suburban in a park and ride lot at the intersection of San Fernando Road and Sierra Highway on the morning of July 20, 1995. At approximately 12:30 a.m. on July 22, Sheriff's Deputies Stairs and Okimoto drove past the parking area and noticed someone sitting in the Suburban's passenger seat. When they looked inside the car, they saw appellant lying on the floor with his head underneath the dashboard and a screwdriver in his hand. The "wind wing" window on the passenger side was broken.

After appellant got out, the officers found the screwdriver, a large rock on the floor on the passenger's side, and broken glass on the floor, seat, and the knees of appellant's pants. The doors on the passenger side were unlocked, while those on the driver's side were locked. After determining that appellant was not the car's owner, the deputies arrested appellant and impounded the car.

Gannon called the sheriff's office when he returned to the park and ride lot on July 22 and could not find his car. When he was shown his car in the impound lot, Gannon noticed that the window was broken, one speaker had been unscrewed, and the sun visors, light bar and a red overnight bag containing clothing and about $30 were missing from the car.

On July 24, 1995, Detective Mundell interviewed appellant, who said that at about 11 p.m., his wife, who was angry with him, dropped him off at San Fernando Road and Sierra Highway. He got cold and needed a place to sleep, so he broke the Suburban's window, unlocked the door, and then entered the car and went to sleep. He denied having a screwdriver in his hand when the deputies contacted him.

Just after the jury began deliberating, defense counsel noticed several jurors talking to Detective Mundell in the hallway "for approximately 15 Minutes." Outside of the presence of the jury, Mundell admitted that he had conversed with one to three jurors after one of the jurors stated, "You're awfully busy in here." Mundell told the court that he and the jurors had not discussed anything pertaining to the case, the defendant, the attorneys, or the court, and that they had instead discussed how busy he was, "Cooperstown, baseball, small towns,....a lot of small talk but nothing to do with this case...."

When the court asked of the jury which jurors had talked to Mundell, three jurors admitted doing so. Each of the jurors denied talking about the trial, the facts of the case, the

witnesses, the evidence, the defendant, the attorneys, the judge, or "anything whatsoever that anybody could say is any discussion about the case or any of the parties connected with the case." Juror 4 told the court that he and Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer." Juror 5 told the court that he talked to Mundell about the amount of paperwork Mundell had to do and Mundell's exercise regimen. Juror 22 (sitting as juror number 9) said that she had only asked Mundell how long he thought it would be before the jury was let back into the courtroom.

The court asked if any other jurors had overheard the conversation between Mundell and any of their fellow jurors, and several indicated that they had. The court asked each juror individually whether he or she had heard anything other than what the other jurors had reported. Each juror said that they had not, except for jurors 8 and 11, who said they heard something abut gym equipment. The court then asked each juror individually whether the conversations between Mundell and the jurors would influence his or her judgment in the case. Each juror said that his or her judgment would not be affected. The court repeated its frequent admonishment not to speak to anyone concerning any subject connected with the trial.

An apparently neutral witness to the conversation, Attorney Fefferman, told the court that he overheard "a similar conversation" about work and the effect that Mundell's presence in the court had on his colleagues' workload.

The court denied appellant's motion for a mistrial based on jury misconduct, saying that it accepted the jurors' and Mundell's representations as to the subject matter and the jurors' representations that it would not influence their judgment. Appellant later re-raised the issue in an unsuccessful motion for a new trial.

In bifurcated proceedings, the jury convicted appellant of second degree burglary. The court found that appellant had suffered two prior serious or violent felony convictions within the meaning of the Three Strikes Law, and that he had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The probation report and evidence introduced during the trial indicated that appellant, who was 36 at the time of the current offense, had suffered the following prior convictions as an adult:

Date	Crime	Sentence	History
8/13/79	Grand theft auto	3 years probation	16 months in prison following probation revocation
1/20/81	Grand theft auto	3 years probation	16 months in prison following probation revocation
10/13/81	Grand theft property	Unknown	
5/7/84	1st degree burglary	4 years	Work furlough release on 10/11/85; returned to prison 12/16/85; paroled 4/16/86; returned for parole violation on 9/24/86; paroled 1/31/88

Date	Crime	Sentence	History
5/7/84	Preventing/ dissuading a witness by threat or force	3 years concurrent with burglary sentence	(see above)
7/18/86	Trespass with injury to property	Returned to prison as parole violator	(see above)
7/18/86	Use or under the influence of controlled substance	90 days in jail	
9/10/6	2nd degree burglary	3 years	Paroled 1/31/88
5/5/89	Robbery	13 years	On parole at time of current offense

The court stayed the two prior prison term enhancements and sentenced appellant to prison for 25 years to life.

Appellant contends that (1) he was deprived of a fair trial by a conversation between several jurors and a prosecution witness; (2) the trial court erred in excluding evidence of a statement he made to the deputies who removed him from the Suburban; (3) the reasonable doubt instruction was unconstitutionally ambiguous; (4) the Three Strikes Law violates the separation of powers provisions of the California Constitution; (5) the Three Strikes Law violates due process and equal protection principles; and (6) his 25-years-to-life sentence constitutes cruel and/or unusual punishment. Respondent

contends that the trial court erred in staying the prior prison term enhancements, and requests a remand.

DISCUSSION

1. The trial court did not err in denying appellant's motions for mistrial and new trial on the ground of jury misconduct. As an initial matter, appellant contends that the court violated Evidence Code section 1150 by questioning the jurors about whether the conversation with Mundell would influence their judgment. However, in *People v. Cooper* (1991) 53 Cal.3d 771, 838, the Supreme Court upheld just this sort of inquiry, saying that section 1150 applies only to post-verdict inquiries.

When a juror violates his oath as a juror, doubt is cast upon that person's ability to otherwise perform his or her duties. (*People v. Cooper, supra,* 53 Cal.3d at pp. 835-836.) Here, however, because the jurors' conversation with Detective Mundell concerned subjects that were unconnected with the trial, they did not violate their oath[1] or the court's instructions, pursuant to Penal Code section 1122, not to speak to anyone on "any subject connected with the trial." Thus, while the conversation between the jurors and Mundell was improper and fraught with the danger of improper influence and communication of extraneous information, it did not reflect adversely upon the jurors' abilities to carry out their duties.

In *People v. Cobb* (1955) 45 Cal.2d 158, the Supreme Court held that no presumption of prejudice arose from the mere fact that a juror had a private communication with a relative of the accused on a topic unrelated to the trial. (*Id.* at p. 161.)

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1. Pursuant to the requirements of Code of Civil Procedure section 232, subdivision (b), the jurors agreed to "well and truly try the cause now pending before this court, and a true verdict render therein according only to the evidence presented ... and to the instructions of the court."

Without mentioning *Cobb*, the court in *People v. Ryner* (1985) 165 Cal.App.3d 1075, upon which appellant relies, held that a presumption of prejudice arose even where the subject of the conversation between a juror and a prosecution witness was unrelated to the pending case. (*Id.* at p 1082.) Since *Cobb* has not been overruled, we are bound to apply it and to disregard the contradictory holding of *Ryner.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. See *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1485 [rejecting *Ryner* as inconsistent with *Cobb* and holding that no presumption of prejudice arose from a prosecution witness's conversation with a juror regarding matters unrelated to the case being tried].) Accordingly, we do not presume any prejudice from the incident.

Appellant has suggested a number of potentially prejudicial effects Mundell's conversation might have had, but the record as a whole discloses no reasonable probability of actual harm to appellant. Juror 22's question was a trivial inquiry regarding the court's hours. Juror 4 explained the intent of his comment that Mundell was "doing such a good job as an officer" to mean that Juror 4 would not want to have Mundell's job. Thus, rather than expressing admiration for Mundell, the juror was simply saying that police work was necessary, but unenviable. No topic discussed by Mundell and Jurors 4 or 5 and any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be influenced by the conversation between Mundell and members of the jury. Appellant argues that, pursuant to *Ryner*, the jurors' statements must be disregarded. However, the *Ryner* court's decision to ignore the jurors' statements was based on its belief that Evidence Code section 1150 prohibited the consideration of such statements, even though they were made prior to the verdict. As previously noted, *Cooper* rejected this proposition. (*People v. Cooper, supra,* 53 Cal.3d at p. 838.)

2. The court properly excluded appellant's hearsay statement to the deputies. The prosecutor succeeded in excluding as hearsay appellant's statement to Deputies Stairs and Okimoto that he had not broken into the Suburban. After the case had gone to the jury, appellant made an offer of proof that the deputies would have testified that appellant made the statement as he got out of the Suburban. In the trial court appellant argued that the statement was admissible as a spontaneous declaration, a contemporaneous declaration, evidence of his state of mind, and a prior inconsistent and consistent statement. Appellant now contends that the testimony would have been admissible pursuant to Evidence Code section 1202, 1240, and 1241.

Evidence Code section 1202 permits the admission, for impeachment only, of an inconsistent statement by the declarant of a hearsay statement which has been admitted in evidence. The purpose of this rule is fairness to the party against whom the hearsay evidence was admitted, to compensate for the lack of an opportunity to cross-examine the declarant. (*People v. Ross* (1979) 92 Cal.App.3d 391, 406.)

Appellant essentially argues that he was entitled to impeach himself by having the deputies testify to his statement which contradicted the statement that Detective Mundell would later testify that appellant had made, i.e., that appellant had broken into the car. In addition to the fact that appellant's admission to Mundell was not yet in evidence, appellant's desire to impeach himself belies his true intent: to introduce the statement to prove that he did not break into the car. Because evidence admitted pursuant to section 1202 is limited in use to impeachment, the statute provides no basis for admission of the testimony in issue.

Evidence Code section 1240 establishes a hearsay exception for a statement which (1) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant

and (2) was made spontaneously while the declarant was under the stress of excitement caused by such perception. Appellant's statement to Stairs and Okimoto does not purport to describe, narrate, or explain a *perceived* act, condition, or event, but instead simply described his own conduct. Furthermore, it was not made under the stress of excitement caused by the explained act or event, which in this case would be appellant's entry into the Suburban. Appellant improperly attempts to shift the source of "excitement" to being caught in the vehicle. However, section 1240 expressly requires that the "excitement" be caused by the perception of the act, condition, or event which the statement purports to describe, etc.

Similarly, the statement was not admissible pursuant to Evidence Code section 1241, which provides a hearsay exception for a statement which (1) was made while the declarant was engaged in particular conduct and (2) is offered to explain, qualify, or make understandable that conduct. Appellant's statement about how he got into the Suburban was not made while he was getting into the car, but after he was ordered out of it by the deputies.

3. The trial court properly instructed the jury regarding reasonable doubt. Appellant contends that the reasonable doubt instruction, CALJIC 2.90,[2] violated due process because it failed to define "an abiding conviction." We have repeatedly rejected such contentions (see, e.g., *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077-1078; see also, *People v. Tran* (1996)

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2. In relevant part, CALJIC 2.90 provides as follows: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

47 Cal.App.4th 253, 262-263.) For the reasons stated in these cases, appellant's claim has no merit.

4. The Three Strikes Law does not violate the separation of powers provision of the state Constitution. Appellant contends that the Three Strikes Law's requirement that the prosecutor plead and prove all prior serious or violent felony convictions usurps prosecutorial discretion and therefore violates the separation of powers principle set forth in article I, section 3 of the California Constitution. Division 4 of this court rejected an identical contention in *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-1333, which we find persuasive.

5. The Three Strikes Law does not violate due process or equal protection principles. Appellant contends that the Three Strikes Law violates due process and equal protection principles by irrationally and arbitrarily imposing longer sentences on persons whose crimes are of decreasing severity than on those whose crimes are escalating in severity.

In the exercise of its police power, the legislature does not violate due process by enacting a statute which is procedurally fair and reasonably related to a proper legislative goal. (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 78; *People v. Cooper* (1996) 43 Cal.App.4th 815, 829.) The wisdom of legislation, the availability of less drastic remedial alternatives, and the failure to solve all related ills at once are inconsequential to this analysis. (*Hernandez, supra,* at p. 78; *Cooper, supra,* at p. 829.) Moreover, penal sanctions need not be perfectly structured so that all degrees of culpability are placed in their proper position in a continuum of penalties. (*Ibid.*) Application of the Three Strikes Law to everyone previously convicted of one or more serious or violent felonies who commits any new felony, without regard to whether the new offense is more or less serious than the prior offenses, is rationally related to the legitimate governmental goal of discouraging recidivism. (*Ibid.*; *People v. Kilborn, supra* 41

Cal.App.4th at pp. 1328-1330.) Accordingly, the law does not violate due process.

With respect to his equal protection claim, appellant has failed to show the threshold prerequisite: unequal treatment of persons who are similarly situated. (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) A defendant convicted of one crime is not similarly situated to a defendant convicted of a different crime (*People v. Jacobs* (1984) 157 Cal.App.3d 797, 800, 803), and a recidivist previously convicted of a serious or violent felony is not similarly situated to a recidivist previously convicted of a nonserious, nonviolent felony, in that the former has previously demonstrated a much greater danger to society than the latter. (*People v. Cooper, supra,* 43 Cal.App.4th at p. 828.) Thus, the alleged disparities between the Three Strikes Law's effect on appellant and his hypothetical escalating recidivist do not implicate the equal protection clause. (*Id.* at pp. 828-830; *People v. Kilborn, supra,* 41 Cal.App.4th at pp. 1330-1332.)

6. The length of appellant's sentence does not violate the federal or state constitution. Appellant also contends that his 25-years-to-life sentence violates both the Eighth Amendment and article I, section 17 of the California Constitution. Traditionally, Eighth Amendment proportionality analysis focused upon the gravity of the offense and harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdiction. (*Solem v. Helm* (1983) 463 U.S. 277, 292.) However, *Harmelin v. Michigan* (1991) 501 U.S. 957, which contained no majority opinion, cast doubt on the continuing validity of a proportionality challenge in a non-capital case. Two justices concluded the Eighth Amendment contains no proportionality guarantee (*id.* at p. 965 [opn. of Scalia, J.]) and three other justices concluded the amendment forbids only those sentences which are "grossly disproportionate" to the crime (*id.* at p. 1001 [opinion of Kennedy, J.]). Even those justices recognizing a guarantee of

proportionality review stressed that, outside the context of capital punishment, successful challenges to particular sentences are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." (*Ibid.*)

Under the Three Strikes Law, defendants are punished not just for their current offense but for their recidivism. *Rummel v. Estelle* (1980) 445 U.S. 263, recognized that recidivist felons pose a danger to society which justifies the imposition of lengthy sentences for even relatively minor subsequent offenses. (*Id.* at p. 284.) The court noted that the length of and prerequisites for imposition of such a sentence are largely within the punishing jurisdiction's discretion. (*Id.* at pp. 284-285.) Therefore, even if the Three Strikes Law punishes more severely than other recidivist measures, such severity does not render the punishment grossly disproportionate to the crime. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005; *Rummel v. Estelle, supra,* 445 U.S. at pp. 284-285.)

The basic test of a cruel or unusual punishment under the California Constitution is whether it is so disproportionate to the crime as to shock the conscience and offend the fundamental notions of human dignity. (*People v. Dillon*, (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 424.) The main technique of analysis is to examine the nature of the offense and of the offender. (*Dillon,* at p. 479.) The court must consider both the nature of the offense in the abstract, and the facts of the crime in the particular case, including factors such as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences. (*Ibid.*) With respect to the nature of the offender, the question is whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Here, appellant's Three Strikes sentence was predicated on his current felony conviction, coupled with prior robbery and burglary convictions. (Pen. Code, § 1170.12, subd. (b)(1).) Appellant also had prior convictions for grand theft auto (two), grand theft property, preventing or dissuading a witness by threat or force, trespass with injury to property, second degree burglary, and using or being under the influence of a controlled substance. He had spent many years in prison and was on parole for the 1989 robbery conviction at the time he committed the current offense. Appellant's long history of recidivism, coupled with his current offense, justify the term imposed.

7. The trial court erred in failing to either strike or impose the Penal Code section 667.5, subdivision (b) enhancements. The only authorized procedure for not imposing sentence on a prior prison term enhancement is to strike it. (*People v. Jones* (1992) 8 Cal.App.4th 756, 758.) We construe the the trial court's stay of the enhancements as expression of its intent that appellant not serve the additional terms.

DISPOSITION

The judgment is modified by striking the two stayed Penal Code section 667.5, subdivision (b) enhancements. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

NEAL. J.

We concur:

LILLIE, P.J.

WOODS, J.

APPENDIX K

APPENDIX K

VAN NUYS, CALIFORNIA; THURSDAY, AUGUST 8, 1996
1:30 P.M.

DEPARTMENT NV-C HON. CHARLES L. PEVEN, JUDGE

APPEARANCES:

THE DEFENDANT, GREGORY DEAN CALIENDO, WITH HIS COUNSEL, JOANNE HARROLD, ATTORNEY AT LAW; JANE WINSTON, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA; AND ROBERT A. FEFFERMAN, DEPUTY PUBLIC DEFENDER OF LOS ANGELES COUNTY.

(WENDY SCHRIVER, CSR #7271, OFFICIAL REPORTER.)

(AT 2:10 P.M. THE JURY RETIRED TO RESUME THEIR DELIBERATIONS, AND AT 2:30 P.M. THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD IN THE CASE OF PEOPLE VERSUS CALIENDO. LET THE RECORD REFLECT MR. CALIENDO IS PRESENT IN COURT WITH HIS COUNSEL. THE PEOPLE ARE REPRESENTED. THE JURY IS NOT IN THE COURTROOM AT THIS TIME.

MS. HARROLD, I UNDERSTAND THAT YOU WANTED TO BRING SOMETHING TO THE ATTENTION

OF THE COURT THAT I'VE JUST LEARNED FROM MRS. BLAND.

MS. HARROLD: THAT IS CORRECT, YOUR HONOR. DURING THE NOON RECESS I WAS IN THE CAFETERIA. NUMEROUS JURORS WERE IN THE CAFETERIA. I OBSERVED A LARGE GROUP OF THEM LEAVE AT APPROXIMATELY 1:15 BY THE CAFETERIA CLOCK.

APPROXIMATELY 15 TO 20 MINUTES AFTER THE JURORS HAD LEFT THE CAFETERIA, MYSELF, MRS. CALIENDO, MY ASSOCIATE, MS. MAC DONALD, ALL CAME UP TO THIS FLOOR INTENDING TO COME TO THIS COURTROOM, ASSUMING THAT THE JURY HAD ALREADY ENTERED THE JURY ROOM.

WHEN WE ARRIVED AFTER COMING OFF OF THE ELEVATORS WE SAW THAT OFFICER MUNDELL WAS TALKING WITH OUR JURORS. NEEDLESS TO SAY, I WAS EXTREMELY SHOCKED QUITE FRANKLY BY WHAT I WAS SEEING. I STAYED DOWN BY THE ELEVATORS AWAY FROM THE JURORS, BUT I HAD A CLEAR VIEW OF MY JURORS, AND WE WERE STANDING THERE. THAT OCCURRED FOR APPROXIMATELY 15 MINUTES. HOW LONG THAT HAD BEEN GOING ON I DO NOT KNOW. BUT I KNOW THAT I CAN POINT TO SPECIFIC JURORS THAT I SAW SOME TYPE OF CONVERSATION GOING ON. I SAW THAT THERE WAS LAUGHING AND CAMARADERIE, SOME TYPE OF CONVERSATION GOING ON.

I ASKED THE GENTLEMAN TO MY RIGHT – I DON'T KNOW THIS NAME. I KNOW HE'S A LAWYER.

THE COURT: MR. FEFFERMAN.

MS. HARROLD: I ASKED MR. LETTERMAN –

THE COURT:"FEFFERMAN."

MS. HARROLD: – FEFFERMAN. I'M SORRY. I ASKED MR. FEFFERMAN IF HE KNEW WHERE DETECTIVE MUNDELL WAS. HE DID NOT KNOW WHO DETECTIVE MUNDELL WAS. I ASKED ABOUT THE GENTLEMAN WHO WAS STANDING NEXT TO HIM BECAUSE MR. FEFFERMAN WAS ALSO WAITING FOR THE COURTROOM TO OPEN. AND I EXPLAINED WHO OFFICER MUNDELL WAS BECAUSE HE WAS STANDING THERE, AND I ASKED HIM IN REGARDS TO WHAT PARTS OF THE CONVERSATION HE HEARD BETWEEN OFFICER MUNDELL AND MY JURORS, AND HE INDICATED TO ME THAT PART OF WHAT HE WAS HEARING IN REGARDS TO THE CONVERSATION HAD TO WITH WORKLOAD.

I FIND IT OUTRAGEOUS THAT AN OFFICER OF EIGHT YEARS, INVESTIGATING OFFICER, IS OUT THERE TALKING TO THE JURY ON A CRIMINAL CASE. THAT IS, QUITE FRANKLY, UNBELIEVABLE. I AM ASKING THAT HIS TESTIMONY BE STRUCK. I AM ASKING THAT THE JURY BE INFORMED THAT THIS IS MISCONDUCT, AND I'M ASKING THAT THE COURT TAKE SOME TYPE OF APPROPRIATE SANCTIONS AGAINST OFFICER MUNDELL. THERE MAY BE OTHER ADDITIONAL SANCTIONS; WHETHER MISTRIAL OR WHATEVER, I DON'T KNOW.

THE COURT: ARE YOUR ASKING FOR A MISTRIAL?

MS. HARROLD: I WANT TO LOOK AT THE LAW TO SEE WHAT THE LAW IS. AS I'M SAYING, I'VE WORKED COURTS A LONG TIME. I HAVEN'T SEEN THIS. I AM USED TO IF A WITNESS OR AN OFFICER IS APPROACHED, HE MERELY INFORMS THEM, "I'M SORRY. I CANNOT TALK TO YOU WHILE THE CASE IS

PENDING," AND WALK AWAY. I'M NOT USED TO WATCHING FOR 15 MINUTES WHILE AN OFFICER, A WITNESS, IS TALKING WITH THE JURY.

THE COURT: MS. WINSTON, DO YOU HAVE ANYTHING TO OFFER?

MS. WINSTON: YES. ONLY AS TO WHAT I SPOKE TO – I DIDN'T KNOW ANYTHING ABOUT THIS UNTIL I WALKED IN HERE THIS AFTERNOON. APPARENTLY I SPOKE WITH DETECTIVE MUNDELL, WHO AS YOU KNOW, AS HE TESTIFIED, THIS WAS HIS THIRD JURY TRIAL. SO HE HAD LISTENED TO THE JURY INSTRUCTIONS THIS MORNING WHEN HE WAS SITTING THERE AND HE HAD HEARD THE ONE ABOUT, "DO NOT TALK AMONG YOURSELVES ABOUT THE CASE EXCEPT WHEN YOU'RE IN THE JURY ROOM." SO HE HEARD THAT ABOUT THE CASE, AND I THINK HE MISUNDERSTOOD AND REALLY DIDN'T QUITE KNOW – HE KNEW HE WASN'T SUPPOSED TO TALK ABOUT THE CASE, AND HE TOLD ME SOMEBODY APPROACHED HIM FROM THE JURY AND SAID SOMETHING TO HIM ABOUT, "ARE YOU BUSY?" OR "YOU LOOK BUSY," OR "HAVE YOU BEEN BUSY?" AND THAT APPARENTLY WAS THE WORKLOAD CONVERSATION. I DON'T KNOW THE SUM AND SUBSTANCE OF ANYTHING FURTHER.

ACCORDING TO DETECTIVE MUNDELL, THEY DID NOT TALK ABOUT THE CASE, AND HE DID NOT WANT TO BE RUDE TO ANYBODY AS HE WAS WAITING OUT THERE. HE WAS GOING TO COME IN AND WATCH WHAT WAS GOING ON IN THE COURTROOM THIS AFTERNOON WHILE HE WAS WAITING. SO HE APOLOGIZES. HE DIDN'T REALIZE THAT HE WASN'T SUPPOSED TO HAVE EVEN A BENIGN CONVERSATION

WITH ANYBODY, BUT HE DID NOT DISCUSS THE CASE.

I BELIEVE THE COURT SHOULD PROBABLY ADMONISH THE JURY THAT THEY SHOULD NOT BE APPROACHING AND TALKING TO – AND UNFORTUNATELY DETECTIVE MUNDELL SHOULD HAVE KNOWN THAT, SHOULD HAVE KNOWN TO JUST STAY A DISTANCE AWAY FROM THE JURY IN ORDER TO AVOID THAT. I BELIEVE IF MS. HARROLD IS ASKING FOR A MISTRIAL, THE APPROPRIATE TIME WOULD BE TO ASK FOR IT AND LET YOU RULE ON IT NOW BEFORE THE JURY DELIBERATES ANY FURTHER.

THE COURT: THAT'S WHAT I WAS TRYING TO FIND OUT FROM MS. HARROLD, WHAT IT IS YOU'RE ASKING ME TO DO. YES, I WILL CERTAINLY ADMONISH THE JURORS. I WILL BRING THEM IN. I CERTAINLY WILL ADMONISH THEM NOT TO DISCUSS THE CASE WITH ANYBODY ELSE. ANY CONVERSATION THEY HAD WITH – I'M GOING TO ASK THEM IF ANY OF THEM HAD A CONVERSATION WITH DETECTIVE MUNDELL REGARDING ANY OF THE FACTS OF THIS CASE, IF ANY DISCUSSION WAS HELD WHATSOEVER REGARDING ANY OF FACTS, ANY OF PARTIES IN THIS CASE. I'M GOING TO ASK MR. MUNDELL HERE IN A MINUTE MYSELF, BUT I CAN ADMONISH THEM AND I INTEND TO DO THAT. BUT I WANT TO KNOW WHAT YOU WANT ME TO DO.

ASIDE FROM THAT, I'M NOT INCLINED TO STRIKE HIS TESTIMONY, MS. HARROLD, NO. YOU CAN MAKE A MISTRIAL MOTION, MAKE IT – I WOULD LIKE TO GET SOME FURTHER INFORMATION. FIRST OF ALL, CERTAINLY IF THERE IS ANY INDICATION THAT THERE WAS DISCUSSION BY MUNDELL WITH ANY OF

THE JURORS REGARDING ANY OF THE FACTS OF THIS CASE, THE PARTIES IN THE CASE, I CERTAINLY WILL BE RECEPTIVE TO A MISTRIAL MOTION IF YOU WISH TO MAKE ONE.

MS. HARROLD: YES, YOUR HONOR. I WOULD LIKE TO HEAR FURTHER FROM OFFICER MUNDELL. I WOULD LIKE TO HEAR FURTHER IN REGARDS TO THE JURORS.

THE COURT: WELL, I INTEND TO CALL THEM OUT IN A MOMENT.

MS. HARROLD: ONE OF THE THINGS IN REGARDS TO OFFICER MUNDELL, I WOULD LIKE THE COURT IN ITS DISCUSSIONS AND ADMONISHMENT WITH THE JURY TO POINT OUT THAT IT'S OFFICER MUNDELL WHO CREATED THE PROBLEM FROM THE STANDPOINT OF IT WAS MISCONDUCT. I DON'T WANT THE JURORS TO FEEL THAT THE COURT IS PENALIZING OR CRITICIZING THEM. OFFICER MUNDELL, HE'S A DETECTIVE. HE'S BEEN WITH THE SHERIFF'S DEPARTMENT EIGHT YEARS. I WOULD LIKE THE JURORS TO KNOW THAT IT'S OFFICER MUNDELL WHO IS THE ONE WHO DID THE MISCONDUCT.

THE COURT: WELL, I'LL SPEAK TO THE JURORS.

MR. MUNDELL, WHY DON'T YOU COME UP HERE FOR JUST A SECOND.

MR. MUNDELL: DO YOU WANT ME TO TAKE THE STAND?

THE COURT: NO, YOU DON'T HAVE TO. YOU CAN STAY RIGHT THERE. YOU'RE UNDER OATH. YOU'RE

ALREADY UNDER OATH FROM BEFORE SO YOU REMAIN UNDER OATH.

ALL RIGHT. NOW, YOU'VE HEARD ALL THIS THAT WAS REPORTED. YOU HEARD WHAT MS. HARROLD WAS JUST SAYING. SHE SAW YOU APPARENTLY OUTSIDE THE COURTROOM HERE HAVING SOME TYPE OF DISCUSSION WITH AT LEAST SOME OF THE JURY PANEL. I DON'T KNOW HOW MANY. WERE YOU SPEAKING WITH SOME OF THE JURORS OUTSIDE IN THE HALLWAY BEFORE OUR AFTERNOON SESSION HERE?

MR. MUNDELL: YES.

THE COURT: OKAY. HOW MANY JURORS APPROXIMATELY WERE YOU SPEAKING WITH?

MR. MUNDELL: PRIMARILY ONE. TWO OR THREE – TWO WERE STANDING BEHIND HIM AND THEY COLLECTIVELY MENTIONED – OR ONE MENTIONED WHICH SET OFF ANOTHER ONE, YOU KNOW, "YOU'RE AWFULLY BUSY IN HERE."

AND I SAID, "YES, I AM A BUSY PERSON."

AND THE OTHER TWO KIND OF DISAPPEARED, AND THE ONE MALE SPOKE WITH ME FOR APPROXIMATELY 10 MINUTES WHILE WE WERE WAITING TO COME INTO THE COURTROOM, AND WE DID NOT DISCUSS ANYTHING ABOUT THIS CASE.

THE COURT: THAT'S MY QUESTION.

MR. MUNDELL: WE DID NOT EVEN COME CLOSE –

THE COURT: WAS THERE ANY DISCUSSION WHATSOEVER –

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: – BETWEEN YOU AND ANY OF THE JURORS, ANY OF THE JURORS, REGARDING ANY OF THE FACTS OR ANYTHING AT ALL ABOUT THIS CASE?

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: WAS THERE ANY DISCUSSION ABOUT ANY OF THE PARTIES, MR. CALIENDO, EITHER LAWYER, THE JUDGE, ANYTHING AT ALL ABOUT THE COURT PROCEEDINGS THAT TOOK PLACE IN THIS CASE OVER THE LAST THREE, FOUR – THIS IS THE FOURTH DAY NOW WE'VE BEEN ENGAGED IN THIS – OVER THE LAST FOUR DAYS? ANYTHING DISCUSSION WHATSOEVER IN THAT REGARD?

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: SO WHAT YOU'RE TELLING ME IS THAT ONLY DISCUSSION YOU HAD WAS ABOUT YOUR WORKLOAD?

MR. MUNDELL: THE WORKLOAD. I DON'T KNOW. WE TALKED ABOUT COOPERSTOWN, BASEBALL, SMALL TOWNS. WE TALKED ABOUT A LOT OF SMALL TALK BUT NOTHING TO DO WITH THIS CASE OR ANY OF THE DEFENDANTS OR ANY PARTIES OR ANYTHING ABOUT THIS BUILDING. WE DID NOT HAVE ANY DISCUSSIONS ABOUT THAT WHATSOEVER.

THE COURT: OKAY. NOW, YOU REALIZE THE PROBLEM YOU CAUSED, RIGHT?

MR. MUNDELL: RIGHT. I WAS REPRIMANDED THERE BY THE DISTRICT ATTORNEY, AND SHE MADE ME FULLY AWARE OF MY STUPIDITY.

THE COURT: FIRST OF ALL, YOU KNOW WHY YOU'RE HERE. YOU HAVE A RIGHT TO BE HERE IF YOU WANT TO BE HERE. NORMALLY MOST INVESTIGATING OFFICERS AFTER THE CASE IS SUBMITTED TO A JURY WILL LEAVE, GO ABOUT THEIR BUSINESS, MAYBE KEEP IN CONTACT WITH THE PROSECUTOR OR THE COURT AS TO WHAT THE OUTCOME OF THE CASE IS, BUT YOU'RE HERE. SO BE IT. BUT YOU UNDERSTAND WHAT YOU'RE DOING HERE? YOU'RE NOT PERMITTED TO SPEAK TO THE JURY. YOU'RE JUST NOT TO DO THAT. YOU'RE NOT TO HAVE ANY DISCUSSION WITH ANY OF THE JURORS. DO YOU UNDERSTAND THAT?

MR. MUNDELL: I UNDERSTAND IT NOW, YES.

THE COURT: YOU HAD NO IDEA BEFOREHAND THAT YOU SHOULDN'T SPEAK TO A JUROR?

MR. MUNDELL: I WAS LISTENING TO THE JURY INSTRUCTIONS, AND IT WAS MY UNDERSTANDING AS LONG AS THEY WERE NOT TALKING TO ME OR ANY OTHER JUROR ABOUT THE CASE, THEN IT WAS OKAY TO SPEAK WITH THEM. AND I WASN'T GOING TO – IF SOMEBODY COMES UP AND TALKS TO ME OVER AND ABOVE ANYTHING, I'M NOT GOING TO BE RUDE TO THEM AND SAY, "I'M NOT GOING TO TALK TO YOU."

THE COURT: WELL, THAT'S BASICALLY WHAT YOU HAVE TO DO. YOU CAN SAY, "I WOULD LIKE TO TALK TO YOU BUT I'M NOT PERMITTED TO SPEAK WITH YOU," AND JUST GO ABOUT YOUR BUSINESS, AND GO STEP AWAY OR GO AWAY.

MR. MUNDELL: I'M AWARE OF THAT NOW.

THE COURT: I HAD ALREADY TOLD THE JURORS THE JURORS SHOULD NOT BE APPROACHING YOU ALSO, AND I HAD ALREADY HAD SOME DISCUSSION WITH THEM IN THAT REGARD, BUT THEY DON'T PAY ATTENTION SOMETIMES EITHER. ALL RIGHT. I'LL ACCEPT YOUR REPRESENTATION. YOU REALIZE YOU ARE UNDER OATH.

MR. MUNDELL: THAT'S THE TRUTH.

THE COURT: YOU HAD NO DISCUSSION WHATSOEVER WITH ANY OF THE JURORS ABOUT ANY OF THE COURT PROCEEDINGS IN THIS CASE?

MR. MUNDELL: NOPE. I'LL BE MORE THAN HAPPY TO POINT HIM OUT. YOU CAN BRING HIM OUT HERE AND –

THE COURT: DO YOU KNOW WHICH JUROR IT WAS THAT YOU SPOKE TO? PRIMARILY YOU SAY YOU SPOKE TO ONE JUROR, PRIMARILY.

MR. MUNDELL: YEAH. IT WAS A MALE, CURLY HAIR. I THINK HE HAD LIKE A WHITE SWEATER ON. I DON'T WHAT NUMBER HE WAS. I DON'T EVEN KNOW IF HE WAS PART OF THE JURY. I ASSUME HE WAS SINCE HE WAITED OUT HERE AND HE IDENTIFIED ME AS A BEING A POLICE OFFICER.

THE COURT: ALL RIGHT. YOU CAN TAKE YOUR SEAT. THANK YOU.

ALL RIGHT. LET'S GET THE JURORS. WE DON'T NEED THE ALTERNATES.

(THE JURORS RETURNED INTO THE COURTROOM AT 2:40 P.M., AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: LET THE RECORD REFLECT THE JURY IS BACK IN THE COURTROOM.

GOOD AFTERNOON, EVERYBODY.

THE JURY PANEL: GOOD AFTERNOON.

THE COURT: I'VE CALLED YOU OUT THERE NOW BECAUSE A SUBJECT HAS COME UP. IT'S SOMETHING THAT HAS BEEN BROUGHT TO MY ATTENTION AND I NEED TO HAVE SOME INQUIRY, SOME COLLOQUY WITH THE JURY PANEL AS A WHOLE.

IT'S BEEN BROUGHT TO MY ATTENTION THAT PRIOR TO YOU COMING IN THE COURTROOM THIS AFTERNOON TO DELIBERATE, PRIOR TO THE COURTROOM BEING OPENED UP – THIS IS AFTER THE LUNCH HOUR – THAT APPARENTLY SOME OR ALL OF YOU WERE STANDING OUTSIDE THE COURTROOM, OUTSIDE THE HALLWAY WAITING TO COME INTO THE COURTROOM, THE COURTROOM TO BE OPENED UP, THAT SOME OF YOU ON THE JURY PANEL HAD SOME DISCUSSION WITH ONE OF THE WITNESSES IN THIS CASE, DETECTIVE MUNDELL, WHO IS, OF COURSE, NOW SEATED IN THE BACK OF THE COURTROOM. YOU ALL RECOGNIZE DETECTIVE MUNDELL. AND IT'S BEEN BROUGHT TO MY ATTENTION THAT SOME OF YOU HAD SOME CONVERSATIONS WITH HIM, AND I NEED TO ASK YOU ABOUT THAT.

HOW MANY ON THE JURY PANEL HAD SOME KIND OF CONVERSATION WITH DETECTIVE MUNDELL OVER THE NOON HOUR?

(THE JURORS RESPONDED.)

THE COURT: ALL RIGHT. SO WE HAVE MR. 005, MR. 004, AND MS. 022. ONLY THE THREE OF YOU. NOBODY ELSE? NONE OF THE OTHER NINE OF YOU HAD ANY DISCUSSION WHATSOEVER WITH DETECTIVE MUNDELL? APPARENTLY NOT. DID ANY OF YOU, THE OTHER NINE OF YOU, OVERHEAR ANY OF THE CONVERSATION BETWEEN ANY THE THREE?

(THE JURORS RESPONDED.)

THE COURT: OKAY. ALL RIGHT. WE'VE GOT SEVERAL OTHER PEOPLE HERE NOW THAT OVERHEARD THE CONVERSATION.

NOW, THE QUESTION COMES UP AS TO ANY OF THIS CONVERSATION THAT YOU HAD WITH DETECTIVE MUNDELL, DID ANYBODY HAVE ANY DISCUSSION WHATSOEVER WITH HIM ABOUT THE FACTS OF THIS CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANYBODY HAVE ANY DISCUSSION ABOUT ANYTHING THAT'S TAKEN PLACE OVER THE LAST FOUR DAYS CONCERNING THIS TRIAL WITH DETECTIVE MUNDELL?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANYBODY DISCUSS MR. CALIENDO OR ANY OF THE FACTS OF THE CASE, ALLEGEDLY

WHAT IT IS ALLEGED THAT HE WAS SUPPOSED TO HAVE DONE, ANY DISCUSSION ABOUT MS. HARROLD, HIS LAWYER OR THE PROSECUTOR, MS. WINSTON, OR MYSELF, OR ANYTHING WHATSOEVER THAT ANYBODY COULD SAY IS ANY DISCUSSION ABOUT THE CASE OR ANY OF THE PARTIES CONNECTED WITH THE CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANY OF THE WITNESSES THAT MIGHT HAVE TESTIFIED, ANY OF THE EVIDENCE THAT MIGHT HAVE COME IN OVER THE LAST THREE, FOUR DAYS, DID ANY OF YOU HAVE ANY DISCUSSIONS WITH DETECTIVE MUNDELL ABOUT ANY OF THAT?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: MR. 005, WHAT WERE YOU TALKING ABOUT?

JUROR NO. 5: WE TALKED ABOUT THE AMOUNT OF PAPERWORK ON DETECTIVE MUNDELL'S DESK TOP AND HIS EXERCISE REGIME AND THE FACT THAT HE DOESN'T HAVE A TELEVISION IN HIS HOUSE WHERE HE WORKS OUT.

THE COURT: MR. 004, WHAT WERE YOU TALKING TO HIM ABOUT?

JUROR NO. 4: WE TALKED BOUT EATING, AND HE HAS TO PAY SO MUCH MONEY TO EAT HERE ALL THE TIME, AND THAT HE'S DOING A GOOD JOB AS AN OFFICER; IN OTHER WORDS, I WOULDN'T WANT TO BE IN HIS POSSESSION TO BE A COP OR OFFICER. I WAS TALKING ABOUT BASEBALL. I WAS TALKING

ABOUT MY NEIGHBOR. THAT'S IT. JUST SURFACE TALK.

THE COURT: MS. 022, WHAT WERE YOU TALKING ABOUT?

JUROR NO. 9: I ASKED HIM HOW LONG HE THOUGHT IT WOULD BE BEFORE WE GET BACK INTO COURT TO START DELIBERATING.

THE COURT: ANY OF THE REST OF YOU THAT HEARD ANY OF THE DISCUSSIONS? DID ANYBODY HEAR ANYTHING ELSE, OTHER THAN WHAT THE JURORS ARE REPORTING NOW?

(THE JURORS RESPONDED.)

THE COURT: MS. 001?

JUROR NO. 1: "001."

THE COURT: 001, SORRY. DID YOU HEAR ANY OTHER DISCUSSION, OTHER THAN WHAT'S BEING REPORTED NOW?

JUROR NO. 1: NO, I DID NOT.

THE COURT: MR. 002, DID YOU OVERHEAR ANY DISCUSSION ABOUT ANYTHING ELSE, OTHER THAN WHAT'S BEING REPORTED NOW?

JUROR NO. 2: NO.

THE COURT: MS. 003, DID YOU OVERHEAR ANY DISCUSSION AT ALL?

JUROR NO. 3: NO.

THE COURT: MR. OO6, DID YOU HEAR ANY DISCUSSION BETWEEN ANY OF THE JURORS ABOUT ANY OF THE FACTS OF THE CASE?

JUROR NO. 6: NO. I DIDN'T HEAR ANY OF THE CONVERSATION WITH THE OFFICERS.

THE COURT: AT ALL.

MR. 012, DID YOU OVERHEAR ANY OF THE CONVERSATION?

JUROR NO. 12: NO, I DIDN'T HEAR ANYTHING

THE COURT: OKAY. MR. 014.

JUROR NO. 11: NO, I DIDN'T HEAR ANYTHING

THE COURT: MS. 016, YOU INDICATED YOU MIGHT HAVE OVERHEARD SOMETHING?

JUROR NO. 10: JUST ABOUT THE GYM EQUIPMENT.

THE COURT: GYM EQUIPMENT.

MR. 020, DID YOU OVERHEAR ANY CONVERSATION?

JUROR NO. 8: ALL I HEARD WAS THE GYM EQUIPMENT.

THE COURT: GYM EQUIPMENT.

MR. 007, DID YOU OVERHEAR ANY CONVERSATION?

JUROR NO. 7: NO.

THE COURT: LET ME ASK YOU THIS. ANYBODY ON THIS JURY PANEL, THE FACT THAT YOU MIGHT HAVE HAD A DISCUSSION WITH DETECTIVE MUNDELL ABOUT WHAT IT IS YOU WERE TALKING TO HIM ABOUT OR ANY OF YOU MIGHT HAVE OVERHEARD ANY CONVERSATION BETWEEN ANY OTHER JUROR AND DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE AT ALL ANY OF YOUR JUDGMENT IN THIS CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: MS. 001?

JUROR NO. 1: NO.

THE COURT: MR. 002.

JUROR NO. 2: NO.

THE COURT: MS. 003?

JUROR NO. 3: NO.

THE COURT: MR. 004, ANY DISCUSSION YOU HAVE WITH DETECTIVE MUNDELL? ARE YOU GOING TO GIVE, FOR EXAMPLE, ANY GREATER WEIGHT NOW TO HIS TESTIMONY THERE, OR ARE YOU GOING TO CONSIDER ANY OF THE CONVERSATION THAT YOU HAD WITH HIM IN JUDGING THE GUILT OR INNOCENCE OF MR. CALIENDO ON THESE CHARGES?

JUROR NO. 4: NONE WHATSOEVER.

THE COURT: MR. 005, ANY OF THE CONVERSATIONS YOU HAD WITH DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE YOUR JUDGMENT AT ALL

REGARDING HIS TESTIMONY OR ANY OTHER TESTIMONY THAT YOU HAVE HEARD IN THIS CASE?

JUROR NO. 5: NO IMPACT AT ALL.

THE COURT: WILL IT INFLUENCE YOUR JUDGMENT WHATSOEVER IN ANY RESPECT AS TO THE GUILT OR INNOCENCE OF MR. CALIENDO IN THIS CASE?

JUROR NO. 5: NO.

THE COURT: MR. 006, YOU SAID YOU DIDN'T OVERHEAR ANYTHING?

JUROR NO. 6: THAT'S CORRECT. I DID NOT.

THE COURT: MR. 012?

JUROR NO. 12: NO.

THE COURT: MR. 014?

JUROR NO. 11: I DIDN'T HEAR ANYTHING

THE COURT: MS. 016, WHATEVER IT IS YOU MIGHT HAVE OVERHEARD, TALKING ABOUT GYM EQUIPMENT, WHATEVER, OTHER JURORS TALKING TO DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE YOUR JUDGMENT AT ALL –

JUROR NO. 10: NO. SIR,

THE COURT: – IN THIS CASE?

MS. 022, WHATEVER CONVERSATION YOU HAD WITH DETECTIVE MUNDELL, IS YOUR JUDGMENT

NOW GOING TO BE INFLUENCED AT ALL ABOUT THIS MATTER?

JUROR NO. 9: NO, NOT AT ALL. I WANT TO ADD SOMETHING

THE COURT: GO AHEAD.

JUROR NO. 9: WHEN YOU GAVE US INSTRUCTIONS, YOU SAID THAT YOU'RE NOT AS STRICT AS SOME JUDGES. YOU SAID YOU CAN ACKNOWLEDGE A PERSON'S BEING THERE.

THE COURT: I MEANT BY THAT IF SOMEBODY SAYS "GOOD MORNING" TO YOU, YOU CAN SAY "GOOD MORNING." I DON'T CONSIDER THAT A CRIME.

JUROR NO. 9: AND I THOUGHT MAYBE HE COULD HAVE SOME IDEA OF HOW LONG WE HAD TO BE OUT IN THE HALL.

THE COURT: SO THAT'S ALL YOU SAID TO HIM?

JUROR NO. 9: YEAH. THAT WAS MY INTERACTION WITH HIM.

THE COURT: OKAY. YOU DIDN'T TALK ABOUT GYM EQUIPMENT OR ANYTHING?

JUROR NO. 9: I LOOK LIKE I'VE TALKED ABOUT GYM EQUIPMENT? COME NOW. THANK YOU.

THE COURT: MR. 020, YOU HEARD NONE OF THE CONVERSATION?

JUROR NO. 8: NO. I DID OVERHEAR SOME OF THE CONVERSATION.

THE COURT: YOU OVERHEARD. IS YOUR JUDGMENT AT ALL GOING TO BE AFFECTED BY ANY OF THAT?

JUROR NO. 8: NO, SIR.

THE COURT: OR MR. 007?

JUROR NO. 7: NO.

THE COURT: ONCE AGAIN, LADIES AND GENTLEMEN, I'VE SPOKEN TO DETECTIVE MUNDELL. I DON'T THINK HE'LL EVER SPEAK TO ANY JURORS EVER AGAIN IN HIS LIFETIME. BUT, ONCE AGAIN, I ADMONISH YOU THAT IN A BREAK – I MEAN WE WANT TO BE ABLE TO GIVE YOU BREAKS. WE DON'T WANT TO LOCK YOU UP. WE DON'T WANT TO SEQUESTER THE JURY OR ANYTHING LIKE THAT. BUT DURING THE COURSE OF YOUR DELIBERATIONS NOW IF YOU BREAK, IT'S YOUR DUTY YOU ARE NOT TO CONVERSE EVEN AMONG YOURSELVES OR WITH ANYONE ELSE – THAT MEANS ANYONE ELSE – ABOUT ANY SUBJECT CONNECTED WITH THE TRIAL, AND CERTAINLY YOU ARE NOT TO FORM OR EXPRESS ANY OPINION THEREON UNTIL YOU FINALLY FINISH YOUR DELIBERATIONS. ONLY IN YOUR DELIBERATIONS NOW ARE YOU SUPPOSED TO AMONG YOURSELVES SPEAK, AND, OF COURSE, FORM OPINIONS, EXERCISE YOUR OPINIONS AND GIVE YOUR OPINIONS. BUT WHILE THIS TRIAL IS GOING ON UNTIL IT COMES TO A COMPLETE END AND I TELL YOU YOU CAN SPEAK TO PEOPLE ABOUT THE CASE OR ABOUT ANYTHING ELSE, JUST DO NOT SPEAK TO ANYONE OUT IN THE HALLWAY OR

ANYPLACE ELSE, IN THE BUILDING OR OUTSIDE OR AT HOME OR ANYTHING. DO YOU UNDERSTAND THAT?

(THE JURORS ANSWERED IN THE AFFIRMATIVE.)

THE COURT: OKAY. MS. 001, YOU RAISED YOUR HAND.

JUROR NO. 1: YES. AS FOREPERSON OF THIS JURY, I WOULD LIKE TO FORMALLY APOLOGIZE TO THE COURT FOR THE MISCONDUCT BECAUSE I DID SEE IT AND I DID KNOW THAT IT WAS WRONG, AND I DID GO OVER EVENTUALLY BUT I SHOULD HAVE GONE SOONER AND TOLD THEM THEY WEREN'T ALLOWED TO TALK TO THE WITNESSES.

THE COURT: THANK YOU FOR TELLING ME YOU'RE THE FOREPERSON. NOW WE KNOW.

ALL RIGHT. I THINK EVERYBODY UNDERSTANDS NOW. IT JUST CAUSES PROBLEMS. I MEAN IT WAS REPORTED TO ME, AND IT JUST DOESN'T LOOK RIGHT, AND RIGHT AWAY WE HAVE TO INQUIRE, AND GOD FORBID NOW, SOMEBODY IS OUT IN THE HALLWAY SPEAKING TO THE JURORS ABOUT A CASE WHICH IS COMPLETELY IMPROPER. EVERYBODY SHOULD KNOW THAT. SO I THINK YOU ALL UNDERSTAND NOW. WHY DON'T YOU GO BACK AND RESUME YOUR DELIBERATIONS. THANK YOU.

JUROR NO. 5: YOUR HONOR –

THE COURT: YES, SIR, MR. 005.

JUROR NO. 5: – WE NEED THE EXHIBITS.

THE COURT: OKAY. WE'LL GET THEM BACK TO YOU.

(AT 2:55 P.M. THE JURY RETIRED TO RESUME THEIR DELIBERATIONS, AND THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: ALL RIGHT. THE JURY IS BACK IN DELIBERATION.

MS. HARROLD: YOUR HONOR, PRIOR TO MAKING AN ADDITIONAL MOTION, THERE IS ADDITIONAL EVIDENCE I WOULD LIKE THE COURT TO HEAR, AND THAT IS FROM COUNSEL TO MY RIGHT BECAUSE HE WAS PHYSICALLY STANDING THERE DURING THE PERIOD OF TIME.

THE COURT: MR. FEFFERMAN, DO YOU WANT TO OFFER SOMETHING? MR. FEFFERMAN, GO RIGHT AHEAD.

MR. FEFFERMAN: IF YOU'RE ASKING?

THE COURT: GO AHEAD.

MR. FEFFERMAN: BASICALLY I HEARD A SIMILAR CONVERSATION CONCERNING WORK, AND THERE WAS SOME COLLOQUY BACK AND FORTH BETWEEN ONE OF THE JURORS AND THE OFFICER CONCERNING WHEN HE'S HERE HIS OTHER PEERS HAVE WORK TO DO AND EACH OF THEIR WORKLOAD IS AFFECTED BY PEOPLE BEING IN COURT AND THIS, THAT AND THE OTHER.

THE COURT: BUT YOU HEARD NO CONVERSATION REGARDING THE CASE OR ANY OF THE PARTIES OR FACTS OR CIRCUMSTANCES?

MR. FEFFERMAN: NO. I DIDN'T EVEN KNOW WHO HE WAS AT THE TIME. I THOUGHT POSSIBLY AT FIRST HE WAS ANOTHER FELLOW JUROR STANDING BY THE SIDE. IN FACT, WHEN COUNSEL ASKED ME ABOUT A HALF HOUR AGO WHO OFFICER MUNDELL WAS, I DIDN'T EVEN KNOW WHO HE WAS, AND BASICALLY I SAID, "WELL, THE ONLY PERSON WHO YOU COULD POSSIBLY BE REFERRING TO IS THE MAN DRESSED IN THE BLUE SUIT." SO I DIDN'T KNOW WHO HE WAS AT THE TIME.

THE COURT: THANK YOU. ALL RIGHT.

MS. HARROLD: YES, YOUR HONOR. I AM MAKING A MOTION FOR A MISTRIAL IN REGARDS TO THE MISCONDUCT. CREDIBILITY IS ALWAYS AN ISSUE IN ANY CASE, BUT IN THIS PARTICULAR CASE THE CREDIBILITY OF OFFICER MUNDELL IS EXTREMELY CRITICAL TO THE WAY THE JURORS APPROACH THEIR TASKS AND THE ULTIMATE CONCLUSIONS THAT THEY COME TO.

WHETHER THEY ARE SPEAKING WITH HIM ON THE FACTS OF THE CASE OR ON SOMETHING ELSE IS IRRELEVANT FROM THE STANDPOINT THAT YOU HAVE JURORS WHO ARE SPEAKING WITH A CRITICAL WITNESS. THERE IS HUMANIZATION THAT'S GOING ON BETWEEN THE TWO. THEY ARE VIEWING HIM AS SOMEONE DIFFERENT THAN THE PERSON WHO WAS ON THE WITNESS STAND. IN OTHER WORDS, IF WE LOOK AT THE FACTORS THAT ARE OUTLINED IN I BELIEVE 2.20 ON CREDIBILITY, THE JURORS ARE TOLD THE VARIOUS THINGS THAT THEY CAN

CONSIDER. AND WHEN THEY ARE TALKING WITH HIM AS A PERSON AND THIS SOCIAL COLLOQUY IS GOING ON, THAT IS GOING TO HAVE AN IMPACT IN REGARDS TO WHAT IS BEING DONE.

WE HAVE AN OFFICER WHO IS TAKING ABOUT HOW HE'S OVERWORKED AND OTHER OFFICERS HAVE TO COVER FOR HIM WHEN HE'S GONE, AND WE HAVE A SITUATION WHERE PART OF THE DEFENSE IS THE FAILURE OF PROOF BECAUSE OF WHETHER YOU WANT TO SAY INCOMPETENT OR INEPTNESS OR JUST SHEER LACK OF NOT DOING THEIR WORK BY OFFICER MUNDELL. NOW HE IS GIVING EXPLANATIONS TO THE JURY IN REGARDS TO HOW MUCH WORK HE HAS TO DO, HOW OTHER PEOPLE HAVE TO COVER FOR HIM. I FIND THAT OUTRAGEOUS, AND IT WILL TO ONE DEGREE OR ANOTHER AFFECT THIS JURY. SO I AM ASKING FOR A MISTRIAL.

THE COURT: ALL RIGHT. MS. WINSTON, DO YOU WISH TO BE HEARD?

MS. WINSTON: NO, YOUR HONOR. IT APPEARS TO ME THAT THE JURORS ARE REMORSEFUL AS WELL AS UNIMPRESSED BY THAT CONVERSATION, AND SO I WOULD OBJECT TO ANY –

THE COURT: THEY HAVE ALL INDICATED MS. HARROLD, THAT THE CONVERSATIONS THAT THEY HAD WITH DETECTIVE MUNDELL WILL NOT INFLUENCE THEIR JUDGMENT IN THIS CASE AS TO MR. CALIENDO. I WILL ACCEPT THEIR REPRESENTATIONS. I ACCEPT EVERYBODY'S REPRESENTATION. I'VE HEARD NO INDICATION WHATSOEVER THAT ANYTHING ABOUT THE FACTS OF THE CASE OR ANY OF THE PARTIES IN THIS CASE

WERE DISCUSSED WHATSOEVER. I KNOW WHAT YOU'RE SAYING. IT'S A VERY UNFORTUNATE SITUATION. IT SHOULD NOT HAVE HAPPENED BUT IT DID HAPPEN. DETECTIVE MUNDELL SHOULD KNOW BETTER. HE CERTAINLY SHOULD HAVE KNOWN BETTER.

BUT I WILL ACCEPT THE JURORS AT THEIR WORD THAT THEY WILL NOT LET WHATEVER CONVERSATION THEY HAD WITH DETECTIVE MUNDELL INFLUENCE THEIR JUDGMENT IN THE CASE AS TO WHETHER OR NOT MR. CALIENDO, BASED UPON THE EVIDENCE THAT HAS BEEN INTRODUCED HERE IN COURT, IS EITHER GUILTY OR NOT GUILTY OF THESE CHARGES. SO THE MOTION FOR A MISTRIAL WILL BE DENIED. ALL RIGHT

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VAN NUYS, CALIFORNIA; FRIDAY, OCTOBER 4, 1996
10:30 A.M.

DEPARTMENT NV-C HON. CHARLES L. PEVEN, JUDGE

APPEARANCES:

THE DEFENDANT, GREGORY DEAN CALIENDO, WITH HIS COUNSEL, JOANNE HARROLD, ATTORNEY AT LAW; JANE WINSTON, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(WENDY SCHRIVER, CSR #7271, OFFICIAL REPORTER.)

* * *

WE CAN ADDRESS THE NEXT ISSUE HERE NOW, WHICH IS – LET ME GET IT HERE. IT'S HERE SOMEPLACE. THERE HAS BEEN FILED A NOTICE OF MOTION AND A MOTION FOR A NEW TRIAL, ALONG WITH ATTACHED POINTS AND AUTHORITIES. LET THE RECORD REFLECT THAT I HAVE READ AND CONSIDERED THE DOCUMENT IN ITS ENTIRETY.

DID YOU WISH TO BE HEARD?

MS. HARROLD: YES, YOUR HONOR.

THE COURT: GO AHEAD.

MS. HARROLD: THERE ARE TWO ADDITIONAL DOCUMENTS THAT I WOULD LIKE TO HAVE THE COURT CONSIDER, AND THEY GO ALONG WITH THE DECLARATION BY PAROLE OFFICER MALOY. ACTUALLY THERE ARE THREE PAGES. THE THREE

PAGES OF PRIOR TESTIMONY FROM TRIAL ONE ARE PAGE 80, PAGE 98 AND PAGE 99. AND THE REASON I'M ASKING THE COURT TO CONSIDER THOSE THREE PAGES OF TESTIMONY OF OFFICER MUNDELL, ALONG WITH THE AFFIDAVIT OF PAROLE OFFICER MALOY, RELATE TO THE CREDIBILITY OF OFFICER MUNDELL. AND THEY RELATE TO THE CREDIBILITY OF OFFICER MUNDELL FROM THE STANDPOINT O F HIM INDICATING TO THE COURT THAT HE DIDN'T REALIZE AND DIDN'T KNOW HE WASN'T SUPPOSED TO BE TALKING TO THE JURORS AND ALSO HIS STATEMENTS THAT HE WASN'T TALKING ABOUT THE CASE.

I BELIEVE, NUMBER ONE, THAT THERE IS NO POLICE OFFICER WITH EIGHT YEARS OF EXPERIENCE WHO IS GOING TO CONVINCE ME OR QUITE FRANKLY ANYONE ELSE THAT WORKS THE COURT SYSTEM THAT THEY DON'T KNOW THEY'RE NOT SUPPOSED TO BE TALKING WITH THE JURY THAT IS CONSIDERING A CASE WHERE THEY ARE THE INVESTIGATING OFFICER. QUITE FRANKLY, I FIND THAT VERY DIFFICULT TO BELIEVE.

AND ALSO, OFFICER MUNDELL'S CREDIBILITY FROM THE STANDPOINT OF WHAT HE HAS AND HAS NOT SAID IN THE PAST, IF THE COURT RECALLS, WHEN OFFICER MUNDELL WAS QUESTIONED ON THE FIRST TRIAL IN REGARDS TO A CONVERSATION WITH PAROLE OFFICER MALOY OR ANYONE ELSE ON WHETHER OR NOT OFFICER MUNDELL HAD TOLD ANYONE ABOUT MR. CALIENDO'S PRINTS BEING ALL OVER THE CAR, ALL OVER THE SPEAKERS, ALL OVER THE ROCK, ALL OVER NUMEROUS ITEMS, THAT OFFICER MUNDELL NOT ONLY FLAT-OUT DENIED EVER HAVING MADE THOSE STATEMENTS BUT BASICALLY TESTIFIED THAT IF ANYONE SAID THAT

HE SAID THAT THEY WERE A LIAR. AND WHEN I SHOWED THOSE PAGES TO PAROLE OFFICER MALOY, PAROLE OFFICER MALOY SAID, "SOMEONE IS LYING RIGHT HERE, THAT'S CORRECT, BUT THIS INFORMATION CLEARLY CAME FROM OFFICER MUNDELL. HE'S THE ONE THAT TOLD ME THAT WITHIN A COUPLE OF DAYS OF MR. CALIENDO'S ARREST."

SO FROM THE STANDPOINT OF CREDIBILITY, I'M SORRY, I DON'T BELIEVE OFFICER MUNDELL WHEN HE TELLS THIS COURT QUITE FRANKLY THAT HE DIDN'T REALIZE HE WASN'T SUPPOSED TO BE TALKING TO THIS JURY. AND FROM THE STANDPOINT OF NOT –

THE COURT: WAIT ONE SECOND. LET'S JUST HAVE THE JURORS GO BACK.

(THE JURORS IN AN UNRELATED CASE RE-ENTERED THE COURTROOM TO RESUME THEIR DELIBERATIONS IN THE JURY ROOM.)

THE COURT: ALL RIGHT. I'M SORRY. GO AHEAD.

MS. HARROLD: FROM THE STANDPOINT OF WHETHER OR NOT WHAT OFFICER MUNDELL HAD TO SAY TO THIS JURY INVOLVED THE CASE, I BELIEVE IT DOES INVOLVE THE CASE BECAUSE, AS THE COURT MAY RECALL, OFFICER MUNDELL WAS ATTACKED BY THE DEFENSE NOT ONLY FROM THE STANDPOINT OF CREDIBILITY BUT ALSO FROM THE STANDPOINT OF HIS INCOMPETENCE OR INEPTNESS, OR WHATEVER YOU WANT TO SAY, IN REGARDS TO TRYING TO GET FINGERPRINTS FROM A VAN THREE MONTHS LATER WHEN IT HAD BEEN RELEASED TO THE VICTIM RIGHT AFTERWARDS.

WHEN OFFICER MUNDELL IS SITTING THERE TELLING THE JURORS THAT HE'S OVERWORKED, OTHER OFFICERS HAVE TO COVER FOR HIM WHILE HE IS HERE IN COURT, HE IS CLEARLY EXPLAINING INFERENTIALLY, IF NOT SPECIFICALLY, WHY HE DIDN'T DO A LOT OF THE THINGS THAT HE DIDN'T DO ON THIS PARTICULAR CASE AND WHY IT TOOK HIM THREE MONTHS BEFORE ANYTHING WAS DONE ON THIS PARTICULAR CASE, CLEARLY ATTEMPTING TO JUSTIFY HIS WAITING TO DO SOMETHING ON THIS PARTICULAR CASE. I THINK IT GOES RIGHT TO THE HEART QUITE FRANKLY OF OFFICER MUNDELL'S TESTIMONY.

THIS IS NOT AND WAS NOT A CUT AND DRY CASE. THIS WAS A CASE THAT ON THE FIRST TRIAL HAD RESULTED IN A HUNG JURY, SEVEN-FIVE, SEVEN FOR NOT GUILTY, FIVE FOR GUILTY. ON THE SECOND TRIAL THE JURY WENT OUT I BELIEVE ON A THURSDAY THAT WAS JUST PRIOR TO LUNCH. THEY WERE OUT THURSDAY. THEY WERE OUT FRIDAY. THEY CAME BACK MONDAY PRIOR TO NOON WITH A VERDICT. SO CLEARLY THIS WAS NOT A CUT AND DRY TYPE OF A CASE WHERE THERE WAS SUBSTANTIAL OVERWHELMING EVIDENCE. SO VERY LITTLE IS REQUIRED QUITE FRANKLY TO SWING THE BALANCE ONE WAY OR THE OTHER.

AND WHEN YOU HAVE A POLICE OFFICER WHO IS MAKING EXCUSES TO A JURY IN REGARDS TO CERTAIN THINGS, QUITE FRANKLY I THINK THAT IS OUTRAGEOUS, AND I THINK HIS ANSWER TO THE COURT WAS NOT HONEST. I THINK HIS UNANSWER, HIS NOT ANSWERING THE COURT WHEN THE COURT ASKED OFFICER MUNDELL AND SAID, "OFFICER MUNDELL, QUITE FRANKLY I DON'T UNDERSTAND WHY YOU'RE HERE." HE DIDN'T ANSWER THE

COURT BECAUSE THERE WAS NO REASON FOR HIM TO BE HERE. HE FINISHED HIS PART OF THE CASE ON WEDNESDAY. WEDNESDAY THE DISTRICT ATTORNEY MADE HER OPENING ARGUMENT. THURSDAY MORNING I ARGUED AND MS. WINSTON FINISHED HER REBUTTAL.

THERE WAS NO REASON FOR THAT OFFICER TO BE BACK HERE ON THURSDAY. THERE WAS NO REASON FOR HIM, EVEN IF HE WAS INTERESTED IN THE ARGUMENTS, NOT TO HAVE LEFT THE COURTHOUSE WHEN THE ARGUMENTS WERE OVER, WHICH WAS AGAIN PRIOR TO LUNCH. BUT INSTEAD HE STUCK AROUND AND STOOD OUTSIDE THIS COURTROOM DOOR AND WAS THERE WAITING WHEN THE JURY CAME UP, WAITING TO GET BACK IN THE COURT.

WHEN I CALLED FOR MS. WINSTON AND ASKED HER TO COME UP, SHE ASKED HIM, "WHAT WAS THE PROBLEM?" SHE WAS SHOCKED QUITE FRANKLY THAT DETECTIVE MUNDELL WAS EVEN HERE. SO IT TELLS ME THAT THE D.A. DIDN'T ASK HIM TO BE HERE. HE DIDN'T HAVE ANY OTHER CASE TO TESTIFY ON. THERE WAS ABSOLUTELY NO REASON FOR HIM TO BE OUTSIDE OF THIS COURTROOM IN CONTACT AND IN A POSITION OF WHERE HE WAS TO HAVE CONTACT WITH THESE JURORS, AND THAT'S EXACTLY WHAT HAPPENED.

AND THE CASE THAT I CITED IN THE BRIEF – I BELIEVE IT'S THE REINER CASE – THAT DEALS WITH WHETHER OR NOT IT WAS PREJUDICIAL, CLEARLY IT WAS MISCONDUCT. THE CONDUCT WAS SIMILAR FROM THE STANDPOINT OF A POLICE OFFICER HAVING CONTACT WITH THE JURORS. IT WAS VERY DISSIMILAR FROM THE STANDPOINT THAT THE

OFFICER IN REINER HAD A VERY VALID PURPOSE FOR STILL BEING HERE. PROCEEDINGS WERE STILL GOING ON. HE HAD NOT BEEN EXCUSED. HE WAS STILL IN THE PARAMETERS OF BEING A WITNESS. SO INNOCENT TYPE THINGS LIKE THAT CAN HAPPEN. THERE IS ONLY SO MUCH SPACE IN A COURTHOUSE.

BUT IN REINER, EVEN WITH OVERWHELMING EVIDENCE, SIX EYEWITNESSES, TWO OTHER OFFICERS WHO TESTIFIED TO THE EXACT SAME THING AS THE OFFENDING OFFICER, LET'S SAY, THE COURT STILL FOUND THAT IT WAS MISCONDUCT, AND THEY LOOKED TO THE REST OF THE CASE TO SEE WHETHER OR NOT IT WAS PREJUDICIAL. AND THE ONLY REASON IN REINER QUITE FRANKLY THAT THEY FOUND THAT IT WAS NOT PREJUDICIAL MISCONDUCT AND WOULD HAVE REVERSED IT WAS BECAUSE OF THE OVERWHELMING STRONG EVIDENCE. BUT AS I'M SAYING, EVEN THOUGH THEY FOUND IT NOT PREJUDICIAL, IT WAS STILL MISCONDUCT.

HERE IN THIS PARTICULAR CASE WE HAVE THE MISCONDUCT, AND CLEARLY I BELIEVE IT WAS PREJUDICIAL BECAUSE THE ONLY DIFFERENCE QUITE FRANKLY IN THE DISTRICT ATTORNEY'S CASE BETWEEN WHAT WAS PRESENTED TO THE SECOND JURY AND THE FIRST JURY WAS THE TESTIMONY OF OFFICER MUNDELL ON THE CONVERSATION WITH THE DEFENDANT. THERE WAS NO OTHER CORROBORATION OF THIS CONVERSATION BETWEEN THE DEFENDANT AND OFFICER MUNDELL THAT SUPPOSEDLY TOOK PLACE. THERE WAS NO TAPE RECORDING, NO VIDEOTAPE – VIDEO RECORD. THERE WAS NO FORM FILLED OUT. THERE WASN'T EVEN A WRITTEN FORM OF WAIVER OF RIGHTS THAT WAS DONE IN THIS PARTICULAR CASE, ALTHOUGH

DETECTIVE MUNDELL INDICATED THAT HE WAS AWARE OF ALL OF THOSE ITEMS BEING AVAILABLE, THAT OTHER OFFICERS USED THOSE PARTICULAR ITEMS BUT HE CHOSE NOT TO.

SO I THINK THAT WHEN THE COURT COMPARES THE EVIDENCE IN THIS PARTICULAR CASE, IT DOESN'T COME ANYWHERE CLOSE TO WHAT THE APPELLATE COURT WAS DEALING WITH IN REINER. THE IMPORTANCE OF REINER IS THAT WE HAVE THE MISCONDUCT. THE DIFFERENCE IS THE STRENGTH OF THE PROSECUTION'S CASE IN REINER AS COMPARED TO WHAT WE HAD IN THIS PARTICULAR CASE.

WHEN WE LOOK AT A COUPLE OF THE OTHER AREAS THAT I CITED IN THE BRIEF IN REGARDS TO THE CONDUCT WE HAVE A SITUATION OF WHERE, AGAIN, MUNDELL TESTIFIES THAT MR. CALIENDO SAID HE BROKE INTO THE CAR. OFFICER OKIMOTO AND OFFICER STAIRS INDICATED IN THEIR REPORT AT THE TIME THAT THE DEFENDANT DENIED BREAKING INTO THE VEHICLE. CLEARLY TWO CONFLICTING STATEMENTS. TO HAVE ALLOWED THE TESTIMONY OF DETECTIVE MUNDELL IN FRONT OF THE JURY WITHOUT ALLOWING THE OPPOSITE, THE CONFLICTING EVIDENCE IN FRONT OF THE JURY, THAT ALSO WOULD HAVE AN IMPACT IN REGARDS TO THE JURY NOT HEARING ANOTHER PORTION. THAT I BELIEVE ALSO CONTRIBUTED IN PART TO THE JURY'S FINDING OF GUILT.

AND THEN WHEN I ATTEMPTED TO QUESTION AND SPEAK WITH THE JURORS AT THE CONCLUSION OF THEM BEING EXCUSED, RIGHT AT THE VERY ONSET MS. WINSTON INFORMED THE JURY THAT WE'RE DEALING WITH A DANGEROUS THIRD STRIKER

WHO HAD THREATENED WITNESSES IN THE PAST. I DISAGREE WITH A PROSECUTOR GIVING INFORMATION TO THE JURY THAT HAS BEEN KEPT FROM THEM. I BELIEVE IT BIASES AND PREJUDICES FUTURE JURORS. IT ALSO PREVENTS POSSIBLY – AND THIS IS SPECULATION BUT I THINK IT'S GOOD SPECULATION – IT PREVENTS THE DEFENSE FROM BEING ABLE TO FIND OUT IF THERE WAS ANY OTHER TYPE OF MISCONDUCT BY THE JURORS, BECAUSE ONCE A JURY IS INFORMED THAT THIS IS , QUOTE, "A DANGEROUS INDIVIDUAL WHO'S THREATENED WITNESSES," THIS TYPE OF A THING, THEY ARE NOT GOING TO BE INCLINED TO BE AS OPEN AND DISCUSS THINGS WITH YOU AS THEY WOULD HAVE HAD THIS BEEN KEPT FROM THEM.

AND I THINK WHEN YOU LOOK AT THE RULES OF PROFESSIONAL CONDUCT, IT IS UNPERMISSIBLE FOR ANY ATTORNEY TO GIVE INFORMATION TO JURORS WHICH COULD INFLUENCE THEM IN THE FUTURE, AND QUITE FRANKLY I THINK THAT WHEN A PROSECUTOR TELLS A JURY THAT THIS PERSON HAS ALL OF THESE PRIORS THAT'S GOING TO AFFECT THAT JURY, JUST LIKE AS IF THE PROSECUTOR TOLD THE JURY ABOUT EVIDENCE THAT HAD BEEN SUPPRESSED OR EXCLUDED BY THE COURT.

AND WHEN WE'RE DEALING WITH JURORS WHO ON A ROUTINE BASIS AT LEAST RECEIVE A CALL FOR JURY DUTY EVERY YEAR AND MANY PEOPLE SERVE JURY DUTY EVERY TWO YEARS, THREE YEARS, SOMETHING ALONG THAT NATURE, AND TWO OF THE JURORS INDICATED TO ME THAT YES, KNOWING THAT ABOUT A PERSON WILL INFLUENCE THEM IN THE FUTURE FROM THE STANDPOINT OF FUTURE JURY SERVICE, NOW, WHETHER OR NOT THOSE JURORS WHEN THEY ARE CALLED BACK – AND I'M

SURE THEY WILL BE AT SOME POINT IN THE FUTURE – WHETHER OR NOT THEY WILL TELL THE COURT AND COUNSEL THAT THEY ARE BIASED BY WHAT HAPPENED IN THE LAST TRIAL, I DON'T KNOW. BUT I THINK THAT WHEN YOU LOOK AT THE RULES OF PROFESSIONAL CONDUCT THAT A PROSECUTOR SHOULD NOT BE ALLOWED TO GIVE THAT TYPE OF INFORMATION.

WHY WOULD A DEFENSE BIFURCATE AND WAIVE JURY ON THOSE PRIORS? I MEAN IF THE JURY IS GOING TO GET THAT INFORMATION ANYWAY, THEN WHY NOT JUST TRY IT TO THE JURY? BIFURCATE – AND I UNDERSTAND. BUT WHY NOT JUST GO AHEAD AND TRY IT TO THE JURY, ESPECIALLY ON A THIRD STRIKE CASE WHERE YOU WOULD HAVE NOTHING TO LOSE TO TRY IT? MAYBE THEY WOULD FEEL SOME GUILT IN REGARDS TO FINDING GUILTY ON A VERY WEAK CASE AND HANG UP ON THE PRIORS, FIND THE PRIORS NOT TO BE TRUE.

BUT I THINK THAT THERE IS A VERY VALID CONCERN ABOUT NOT POISONING JURY POOLS. WE HAVE ENOUGH PROBLEMS WITH WHAT THE MEDIA DOES AND THE NEWSPAPERS AND THE RADIO AND THE TELEVISION WITHOUT HAVING THE ATTORNEYS – AND I BELIEVE THAT THE DEFENSE QUITE FRANKLY IS JUST AS GUILTY AS THE PROSECUTION IN MANY INSTANCES OF ATTEMPTING TO INFLUENCE AND POISON FUTURE JURORS. BUT IN THIS PARTICULAR CASE I THINK THAT TO TELL THE JURY THAT WE'RE DEALING WITH A THIRD STRIKER WHO IS DANGEROUS AND ALL OF THAT, KNOWING THAT WE'VE ALREADY HAD A MOTION FOR A MISTRIAL DURING JURY DELIBERATIONS BECAUSE OF

POSSIBLE MISCONDUCT, I THINK THAT IS UNPERMISSIBLE.

SO WHAT I'M ASKING THE COURT TO DO IN REGARDS TO THIS CASE IS TO STEP BACK, LOOK AT THE FIRST CASE, THE FIRST TRIAL, WHAT HAPPENED WITH THE JURY, LOOK AT THE SECOND CASE, WHAT HAPPENED WITH THAT JURY, THE LENGTH OF TIME THAT THE JURY WAS OUT, THE NUMEROUS QUESTIONS AND TESTIMONY REREADS THAT WERE ASKED BY THE SECOND JURY – I DON'T KNOW ABOUT THE FIRST JURY BUT I KNOW THAT THEY DID ASK FOR SOME TESTIMONY. I KNOW THAT THEY DID ASK FOR SOME QUESTIONS. THERE WERE DIFFERENT QUESTIONS THAN THIS JURY HAD, AND EVEN THAT WAS AFTER THE CONTACT WITH OFFICER MUNDELL.

WE EVEN HAD THE JURY FOREMAN VOLUNTEERING TO THE COURT AND SAYING, "YOUR HONOR, I WANT TO APOLOGIZE FOR THE JURY. I KNOW THAT WHAT THESE JURORS WERE DOING WAS WRONG IN TALKING WITH THE OFFICER, AND I SHOULD HAVE WENT OVER THERE AND SAID SOMETHING TO THEM, THAT THEY SHOULDN'T BE DOING THAT." SO YOU EVEN HAVE A JUROR WHO KNOWS THAT SHE AND THE OTHER JURORS ARE NOT SUPPOSED TO BE TALKING WITH WITNESSES, BUT YET THE POLICE OFFICER, THE INVESTIGATING OFFICER, THE MAN WHO IS SITTING HERE THE WHOLE TIME FROM THE END OF VOIR DIRE THROUGH OPENING STATEMENT, TESTIMONY, CLOSING STATEMENT, CASE SUBMITTED TO THE JURY, AND HE'S STILL HANGING AROUND SAYING, "I DIDN'T KNOW."

I ASK THE COURT TO FOLLOW THE LAW LAID DOWN IN REINER AND THE ANALYSIS THAT THE

APPELLATE COURT DID AND UNDERTOOK IN REINER IN REGARDS TO WHY WE HAD MISCONDUCT AND WHY IT'S REVERSIBLE AND PREJUDICIAL TO THE DEFENDANT, AND I WOULD ASK THAT THE COURT GRANT THE MOTION FOR A NEW TRIAL.

THE COURT: MS. WINSTON.

MS. WINSTON: YOUR HONOR, I WOULD JUST LIKE TO SPEAK TO A FEW THINGS. I THINK IT'S INAPPROPRIATE FOR COUNSEL TO ARGUE ANYTHING HAVING TO DO WITH THE PROBATION OFFICER OR PAROLE OFFICER WHO DID NOT TESTIFY IN THIS CASE. IF HE HAD TESTIMONY THAT WOULD HAVE BEEN HELPFUL TO THE DEFENSE, SHE WOULD HAVE CALLED HIM TO THE STAND. I DIDN'T SEE HIM HERE. I THINK IT'S INAPPROPRIATE TO ARGUE WHATEVER HAPPENED IN THE FIRST TRIAL AS TO ANYTHING HAVING TO DO WITH THIS JURY, AND SO I WOULD ASK THE COURT NOT TO TAKE ANYTHING FROM THOSE ARGUMENTS.

AS TO THE MISCONDUCT OF DETECTIVE MUNDELL, THE COURT THOROUGHLY WENT INTO THAT WITH THE JURY WITH HIM, DID AN IN-DEPTH INTERVIEW OF EVERY PERSON INVOLVED IN IT. WHETHER SHE BELIEVES HE KNEW ABOUT IT OR NOT, HE INDICATED THAT HE WAS UNAWARE THAT HE COULDN'T TALK TO THEM ABOUT THAT. HE KNEW HE COULDN'T TALK TO THEM ABOUT THE CASE BUT HE INDICATED HE DIDN'T WANT TO BE RUDE TO THEM. I TOLD HIM AT THE END OF THE CASE THAT HE COULD GO NOW. HE SAID HE WAS GOING TO HANG AROUND IN CASE THE VERDICT CAME IN, AND HE HAD SOME FRIEND THAT HE WAS GOING TO HANG WITH. I DON'T THINK HE CAME HERE WITH THE INTENTION OF INFLUENCING

ANYBODY, AND I THINK THAT IS AN UNFAIR ALLEGATION TO MAKE AS TO THE DETECTIVE.

AS TO HIS CREDIBILITY, THE JURY HAD EVERY OPPORTUNITY TO JUDGE HIS CREDIBILITY BEFORE THEY CAME TO THEIR CONCLUSION IN THIS CASE, AND I WOULD REMIND THE COURT THAT THE SO-CALLED MISCONDUCT IN THIS CASE OCCURRED EVEN BEFORE THE JURY HAD ONE MOMENT OF DELIBERATION GOING ON, AND THEN THAT JURY WENT IN AND DELIBERATED FOR TWO AND A HALF DAYS, OBVIOUSLY NOT INFLUENCED ONE WAY OR THE OTHER BY WHATEVER HAPPENED THOSE FEW MOMENTS OUTSIDE THE COURTROOM WITH DETECTIVE MUNDELL.

AS A MATTER OF FACT, THE JURY TOLD ME THAT IF THEY EVER WERE ARRESTED IN A CASE, THEY HOPED THAT THEY WOULD HAVE A JURY THAT TOOK THIS CASE AS SERIOUSLY AND WENT INTO IT IN EVERY DETAIL AS THEY DID IN THIS CASE, TRYING TO GIVE THE BENEFIT OF DOUBT TO THE DEFENDANT EVERY WHICH WAY THEY COULD, AND THEY COULDN'T DO IT AND CAME TO THE CONCLUSION THAT THERE WAS ONLY ONE VERDICT FOR THEM TO MAKE AT THAT TIME. SO I THINK THAT ANY PREJUDICE TO THE DEFENDANT WAS DEALT WITH AND DISMISSED AT THE TIME THAT THE COURT DID THE INTERVIEW OF THE JURY.

AS TO MY SPEAKING TO THE JURORS OUTSIDE THE COURTROOM, THE VERDICT HAD BEEN RECORDED. THE CASE WAS FINISHED. THE JURY WAS DISCHARGED. THEY ASKED ME WHAT HIS RECORD WAS. I TOLD THEM. THEY HAVE A RIGHT TO IT. IT'S PUBLIC KNOWLEDGE. THEY CAN COME TO THE SENTENCING. THEY CAN LOOK AT THE

PROBATION REPORT. SO THERE IS NOTHING THAT I CAN DO TO PREVENT THEM FROM FINDING THAT OUT. IF THEY ASK THE QUESTION, I ANSWER IT. SO I DON'T BELIEVE THERE IS ANYTHING IN THE RULES OF CONDUCT THAT WOULD BE UNETHICAL IN TERMS OF ANSWERING JURORS' QUESTIONS. I HAVE DONE IT IN THE PAST, AS HAVE MANY DISTRICT ATTORNEYS, AS MY RESEARCH HAS INDICATED. SO I DON'T BELIEVE THAT IS A VALID GROUND FOR A MOTION FOR A NEW TRIAL, AND I HAVEN'T HEARD ANYTHING HERE THAT WOULD FIT UNDER THE PENAL CODE UNDER A MOTION FOR A NEW TRIAL OR GRANTING A TRIAL THAT'S NEW. THANK YOU.

THE COURT: ALL RIGHT. AS I INDICATED AT THE TIME OF THE INCIDENT WITH INVESTIGATOR MUNDELL AND THE JURY – MS. HARROLD YOU'VE BEEN AROUND THE COURTS A LONG TIME. MS. WINSTON HAS BEEN AROUND THE COURTS A LONG TIME. I CERTAINLY HAVE BEEN AROUND THE COURTS A LONG TIME. I'VE BEEN ON THE BENCH NOW MANY YEARS, HANDLED MANY TRIALS, INVOLVED IN MANY, MANY TRIALS OVER THE YEARS, DEALT WITH MANY, MANY CRIMINAL CASES WITH INVESTIGATING OFFICERS. THIS IS THE FIRST INSTANCE THAT I EVER WAS AWARE OF THAT AN INVESTIGATOR WOULD BE I GUESS DUMB ENOUGH TO STAND OUT IN THE HALLWAY AND GET HIMSELF IN A SITUATION WHERE HE WAS CONVERSING WITH JURORS.

WHEN IT WAS BROUGHT TO MY ATTENTION AT THE TIME I WAS CERTAINLY UPSET, AS WERE WE ALL, AND IT WAS AN UNHEARD-OF SITUATION. I TRIED TO HANDLE IT THE BEST THAT I COULD, ADMONISHING THE OFFICER, INQUIRING OF HIM WHAT THE SUBJECT OF THE CONVERSATION WAS,

WHY HE WAS HERE, WHY HE WAS SPEAKING TO THE JURORS, WHAT HE HAD SAID TO THE JURORS, HOW MANY JURORS HAD HE SPOKEN TO AND SO FORTH, AND WE GOT HIS EXPLANATION AND HIS STATEMENTS THAT HE HAD NOT DISCUSSED ANY OF THE ISSUES OF THE CASE AND THE PEOPLE INVOLVED IN THE CASE, HE DID NOT DISCUSS ANYTHING ABOUT THE CASE WITH THE JURORS. HE WAS MERELY SIMPLY TALKING SMALL TALK, BASEBALL, HIS WORKLOAD, THINGS OF THIS NATURE. I DON'T KNOW WHY HE WAS DOING THAT, I DON'T KNOW, BUT HE WAS.

ALL RIGHT. I'VE MADE THE BEST EFFORTS I COULD TO DISCUSS THIS WITH THE JURORS AND INQUIRED OF ALL THE JURORS WHO HAD SPOKEN TO MR. MUNDELL, WHO HAD OVERHEARD ANY CONVERSATION WITH MR. MUNDELL, HAD THERE BEEN ANY KIND OF STATEMENT AS TO ANY CONVERSATION WHATSOEVER REGARDING ANY OF THE JURORS WITH OFFICER MUNDELL REGARDING ANYTHING ABOUT THIS CASE, AND ALL THE JURORS INDICATED IN THE NEGATIVE THAT THERE HAD BEEN NO SUCH DISCUSSION, AND THEY CONFIRMED THEMSELVES THAT THE CONVERSATION WAS ABOUT THE SHERIFF'S WORKLOAD AND BASEBALL, SPORTS, WHATEVER IT IS THAT THE JURORS HAD TO SAY. IT'S ON THE RECORD.

I ASKED ALL OF THE JURORS TO THE BEST I COULD IS THIS GOING TO INFLUENCE THEM IN ANY WAY, IF THEY HAD THE CONVERSATION WITH DETECTIVE MUNDELL OUT IN THE HALLWAY, THAT WOULD CAUSE THEM TO GIVE LESS WEIGHT TO HIS TESTIMONY AND IS IT GOING TO AFFECT THEIR JUDGMENT IN ANY WAY, AND THEY ALL ANSWERED IN THE NEGATIVE. I DENIED YOUR MOTION FOR A

MISTRIAL AT THE TIME. I LET THE JURY GO AND DELIBERATE. THE JURY DID DELIBERATE. AS-I POINTED OUT TO YOU BOTH HERE NOW, THEY DELIBERATED QUITE SOME PERIOD OF TIME. THEY DELIBERATED IN THREE DIFFERENT DAYS. THEY HAD READ-BACK OF TESTIMONY. THEY HEARD IT. IT WAS A VERY CONSCIENTIOUS JURY. THEY APPARENTLY WORKED VERY HARD AND THEY REACHED A VERDICT, AND THE VERDICT IS, OF COURSE, ADVERSE TO YOUR CLIENT, WITH THE VERDICT OF GUILTY.

THE DETECTIVE'S CONDUCT WAS UNFORTUNATE, INAPPROPRIATE. IT WAS, I BELIEVE, MISCONDUCT ON BEHALF OF THE DETECTIVE THAT HE SHOULD NOT HAVE GOTTEN HIMSELF IN THAT SITUATION. HE SHOULD NOT HAVE SPOKEN TO THOSE PEOPLE. AND I RECOGNIZE THE REINER CASE. I'VE READ THE REINER CASE. I'M AWARE OF THE REINER CASE. I'M AWARE OF THE SITUATION THERE. I SUPPOSE IT'S MISCONDUCT ON THE PART OF THE JURORS ALSO TO HAVE BEEN SPEAKING TO MUNDELL, THOSE OF THE JURORS THAT DID SPEAK TO MUNDELL, BECAUSE THAT'S A VIOLATION I SUPPOSE TECHNICALLY OF THE ADMONITION I HAD GIVEN THEM A NUMBER OF TIMES AND ALL THROUGH THE COURSE OF THE TRIAL, THAT THEY WERE NOT TO CONVERSE AMONG THEMSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH THE TRIAL, THEY WEREN'T TO EXPRESS OR FORM ANY OPINIONS, AND SO FORTH. THEY SHOULD NOT HAVE BEEN IN THE POSITION WHERE THEY WERE SPEAKING WITH THE WITNESS IN THE CASE. HOWEVER, I SUPPOSE IN THEIR MINDS THEY WERE NOT DISCUSSING ANY SUBJECTS CONNECTED WITH THE TRIAL. THEY WEREN'T FORMING OR EXPRESSING ANY OPINION. THEY THOUGHT THEIR

CONTACT WITH MUNDELL WAS INNOCUOUS. THEY WERE TALKING ABOUT OTHER MATTERS.

AND SO AS I SAY, I DENIED YOUR MOTION FOR A MISTRIAL AT THAT TIME, AND ON THAT GROUND I'M ALSO GOING TO DENY YOUR MOTION FOR A NEW TRIAL. I FEEL THAT THE JURY WAS – I TAKE THEM AT WHAT THEY SAID. I TAKE THEIR WORD, THEY WERE NOT INFLUENCED BY THAT BRIEF CONVERSATION THAT THEY MIGHT HAVE HAD WITH MUNDELL IN THE HALLWAY ABOUT MATTERS OUTSIDE OF THIS TRIAL AND IT DID NOT INFLUENCE THEIR VERDICT AT ALL. SO I'M GO TO DENY YOUR MOTION ON THAT GROUND.

INSOFAR AS THE OTHER GROUND THAT YOU'VE STATED, I'M GOING TO DENY YOUR MOTION. I BELIEVE THE RULING I MADE INSOFAR AS THE TESTIMONY THAT WAS OR WAS NOT ALLOWED IN WERE PROPER RULINGS. IF THE APPELLATE COURT DISAGREES WITH ME, SO BE IT. BUT THE MOTION FOR A NEW TRIAL WILL BE DENIED.

INSOFAR AS MS. WINSTON SPEAKING TO THE JURORS OUTSIDE THE HALLWAY, I HAD RELIEVED THE JURY OF ITS ADMONITION ONCE THE VERDICT WAS IN, THE VERDICT WAS RECORDED. I CAN'T CONTROL WHAT COUNSEL – COUNSEL KNOW WHAT THEIR OBLIGATIONS ARE. COUNSEL KNOW WHAT THEY CAN OR CANNOT SAY TO PEOPLE OUTSIDE OF COURT AND OUTSIDE OF A TRIAL SITUATION. I CAN'T SAY WHETHER IT'S A WISE THING OR NOT A WISE THING TO DO, TO TALK TO JURORS ABOUT MATTERS OUTSIDE OF A TRIAL SITUATION AFTER A VERDICT IS IN, TALK ABOUT THE DEFENDANT'S RECORDS OR OTHER INFORMATION THAT THE PROSECUTOR MIGHT BE PRIVY TO OR DEFENSE

COUNSEL, AS YOU MENTIONED, MIGHT BE PRIVY TO COUNSEL TALKING TO THE JURY AFTER HIS TRIAL—THINGS ARE KEPT FROM JURORS, THE EVIDENCE IS KEPT OUT, RULINGS ARE MADE, LAWYERS ARE AWARE OF CERTAIN THINGS.

SOMETIMES JURIES ARE CURIOUS ABOUT CERTAIN THINGS AND THEY HAVE QUESTIONS OF LAWYERS AND THE LAWYERS ANSWER THEM AND SO FORTH. WHETHER THAT'S A WISE THING TO DO OR NOT, THERE APPEARS TO BE NO PARTICULAR PROHIBITION AGAINST IT. I THINK LAWYERS HAVE TO BE GUIDED BY THEIR OWN COMMON SENSE AND GOOD WILL, AND UNDERSTANDING THAT AS OFFICERS OF THE COURT THEY ARE NOT TO TRY TO UNDULY INFLUENCE PEOPLE OR DO ANYTHING OF THAT NATURE.

I'M NOT GOING TO TAKE A POSITION AS TO MS. WINSTON AND HER PRACTICES AND MAYBE OTHER DISTRICT ATTORNEYS PRACTICES, THAT THEY ARE NOT TO TALK TO JURORS AFTER A VERDICT, TALK ABOUT THEIR RECORD, IF ASKED, AND MS. WINSTON SAYS SHE WAS ASKED AND I'M NOT GOING TO TAKE A POSITION ON THAT. I DON'T THINK IT'S SOMETHING FOR ME TO RULE ON ONE WAY OR THE OTHER. IF ANYBODY FEELS THAT WHAT SHE HAS DONE IS IMPROPER, IS A VIOLATION OF THE CANONS OF ETHICS AND SO FORTH, THEN I SUPPOSE IF SOMEBODY FEELS STRONGLY ABOUT THAT THEY COULD BRING THAT UP TO THE STATE BAR. IF THE STATE BAR WANTS TO DO ANYTHING, THEY'LL DO IT. MS. WINSTON WILL HAVE TO DEAL WITH THAT. I'M NOT SUGGESTING THAT THAT'S GOING TO HAPPEN OR THAT THEY WILL DO ANYTHING. I'M JUST SAYING THAT IT'S NOT A MATTER THAT I HAVE TO RULE ON AT THIS POINT AND DEAL WITH

BECAUSE IT DID NOT AFFECT THE VERDICT AND IT HAS NOTHING TO DO WITH HOW THIS TRIAL WAS CONDUCTED. SO ON THE GROUNDS YOU'VE STATED, MS. HARROLD, I AM GOING TO DENY YOUR MOTION FOR A NEW TRIAL.

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